81-693

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981-1982

No.

HULLINGHORST INDUSTRIES, INC.,
Petitioner,

versus

DAVID E. CARROLL
AND
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1.

Is a carpenter, who normally works onshore, and who was injured in the process of erecting scaffolding on a pier, covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act when he takes no part in the loading, unloading, building or repairing of vessels, when he was not assigned to and did not repair or maintain the pier and when neither he nor his employer are engaged in traditional maritime activities?

2.

Is there a separate "employer" test for coverage under the LHWCA in addition to the criteria of "status" and "situs"?

PARTIES TO THE PROCEEDING

All parties to the proceedings from the United States Court of Appeals for the Fifth Circuit, from whose judgment review is sought, are included in the caption of the case before this Court, except BASF-Wyandotte Corporation which was a defendant in the original suit filed in the Eastern District Court for the State of Louisiana, Case No. 75-2467-B and who was dismissed from the suit on December 3, 1975.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Hullinghorst Industries, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reported at 650 F.2d 750 (5th Cir. 1981) (App. A).

OPINIONS BELOW

(1) This matter was originally heard before Administrative Law Judge Robert S. Amery; his decision rendered on September 27, 1976, Case No. 76-LHCA-652, OWCP No. 7-34955, is unreported (App. B).

(2) The Benefits Review Board reversed the decision of Judge Amery on January 27, 1978 in an opinion reported in 7 BRBS 538, BRB No. 76-500 (App. C).

(3) The petition for review from the Benefits Review Board's decision was dismissed by the Fifth Circuit on April 24, 1978 in an unreported decision, number 78-1532 (App. D).

(4) The decision by Judge Amery on remand was unreported and was rendered on August 20, 1979, Case No. 76-LHCA-652, OWCP No. 7-34955 (App. E).

(5) The decision of the United States Court of Appeals for the Fifth Circuit denying Hullinghorst Industries, Inc.'s petition for a stay of the Administrative Law Judge's Order was unreported and was rendered on September 6, 1979, Case No. 79-3142 (App. F).

(6) The decision of the Benefits Review Board denying Hullinghorst Industries' motion to stay payment was rendered on December 6, 1979 and was unreported, BRB No. 79-558 (App. G).

(7) The January 25, 1980 supplemental order of the Deputy Commissioner of the Seventh Compensation District of the Office of Workers' Compensation Programs is unreported, Case No. 76-LHCA-652, OWCP No. 7-34955, BRB No. 79-558, 76-500 (App. H).

(8) The United States Court of Appeals for the Fifth Circuit's denial of Hullinghorst Industries' motion to stay pending disposition of its petition for review was unreported and was rendered on March 10, 1980, Case No. 80-3116 (App. I).

(9) The final decision of the Benefits Review Board in which the appeal was taken to the Fifth Circuit was rendered on May 20, 1980 and was published in 12 BRBS 401, Docket No. 79-558 (App. J).

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on July 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals is based on 33 U.S.C. §921(c), which authorizes an appeal from an order of the Benefit Reviews Board to the United States Court of Appeals.

STATUTES INVOLVED

This case involves a determination of the definition of an "employee" and an "employer" found in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3) and (4):

> "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

FACTUAL STATEMENT OF THE CASE

Hullinghorst Industries, Inc. is a scaffolding subcontractor engaged to erect and dismantle scaffolding at a plant owned by BASF Wyandotte Corporation adjacent to the Mississippi River. At the plant is a pier extending over the waters of the Mississippi River. Hullinghorst Industries, Inc. neither owns nor leases the pier, the plant, nor the surrounding area. Hullinghorst Industries, Inc. has no employees engaged in the loading, unloading, building or repairing of vessels. Hullinghorst Industries, Inc. is not a stevedoring or a longshoring operation.

David E. Carroll was employed by Hullinghorst Industries, Inc. as a carpenter and his job was to erect and dismantle scaffolding. On the day of his injury he was erecting scaffolding on a pier over the waters of the Mississippi River.

Administrative Judge Robert Amery held the facts surrounding Carroll's activities to be uncontested:

". . . The scaffold was to be used as a place on which workmen could stand in order to repair a turntable which had been damaged by a ship which had accidently bent and torn it when the ship left. The turntable was owned by Wyandotte and was used to load ships in the

river. It was located on the edge of the dock over the water and, when operable, its loading pipe could be swung or swivelled from one hold of a ship to another or from one barge to another. It was located about 200 yards from the levee and there was a metal catwalk from the top of the levee to the turntable.

"The claimant's job and that of his crew was not to repair the turntable or the pier; it was solely to build a scaffold upon which other workers, such as pipefitters or ironworkers, and, perhaps insulators, could stand and do the repair work, then at a later time the claimant and his crew would have the job of tearing this scaffold down. Neither the claimant nor any other employees of Hullinghorst Industries, Inc. were engaged in any way with building, repairing, loading or unloading any vessel . . . .

• • •

"Here, the claimant was not engaged in loading, unloading, repairing or building a vessel, nor was there anything peculiar about his work which would expose him to the same risks as longshoremen who move cargo aboard ship or on the dock. The claimant's work as a carpenter had no realistically significant relationship to traditional maritime activity. It had nothing to do with any vessel or cargo, navigation or commerce." (App. B, Decision of Sept. 27, 1976).

It is uncontested that Carroll's job was not to repair the turntable itself. The workmen who were to repair the turntable were not employed by Hullinghorst Industries. The turntable was not owned by Hullinghorst Industries. Neither Hullinghorst Industries nor any of its employees were engaged in any repair or maintenance work on the pier or on the turntable. Carroll never performed any repair work on the pier, its equipment, or any of its appurtenances.

Administrative Law Judge Amery found that Carroll was not engaged in traditional maritime employment and was therefore not a covered "employee" under the LHWCA (App. B.) The Benefits Review Board ("BRB") reversed the decision of Judge Amery (App. C). The BRB held that Carroll was engaged in "maritime employment" within the definition of the LHWCA because his work was "directly involved" with the process of maintaining equipment used in the loading and unloading process. The BRB remanded the case to Judge Amery for further factual findings.

On remand, Judge Amery, following the holding of the BRB, held Carroll to be a covered "employee" and found that he was permanently and totally disabled (App. E).

Both the Fifth Circuit (App. F & I) and the Benefits Review Board (App. G) denied Hullinghorst Industries' motions to stay compensation and, on appeal, the BRB reaffirmed its previous holding that Carroll was an "employee" under the LHWCA (App. J).

On appeal from the decision of the BRB, the Fifth Circuit held, despite the fact that Carroll was not to repair the turntable, despite the fact that Carroll did not engage in the loading, unloading, building or repairing of any vessel, despite the fact that Carroll was not to perform any maintenance on the turntable, despite the fact that no Hullinghorst employee was to perform any maintenance on the turntable and despite the fact that Hullinghorst Industries had no other employees involved in the loading, unloading, building, repairing any vessels, that Carroll was engaged in maritime employment at the time of his injury. 650 F.2d at 758. (App. A).

Hullinghorst Industries submits that the Court of Appeals' ruling is in direct conflict with the language of the LHWCA in that its rationale deletes any meaningful "status" requirement. Furthermore, the Court's opinion grants no weight at all to the definition of "employer" in the Act, thereby reducing its usage to a mere tautology. The appellate court's expansive holding extends coverage to employees who are beyond the scope of both the express language of the statute and congressional intent.

AMPLIFICATION OF REASONS

In 1972 the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §901 *et seq.*) was amended in many respects. To establish coverage under the Act, as amended, an employee has to meet both a "situs" and a "status" test; he must be in an area over or adjacent to navigable waters ("situs") and he must fit the definition of an employee under the Act ("status").

Since the enactment of the amendments to the LHWCA, this Court has had two opportunities to consider the scope of coverage of the Act in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); and *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979).

Caputo involved two employees who were engaged in the process of unloading cargo from vessels. Blundo was a checker and Caputo, on the day of his injury, was loading trucks with cargo that had been discharged from ships. This Court found both Blundo and Caputo were covered "employees" because they were in the "situs" area defined by the Act and were engaged in the "essential elements of unloading a vessel." 432

U.S. at 267. This Court noted that the "status" requirement of the LHWCA is an occupational one:

> "The Act focuses primarily on occupations; longshoreman, harborworker, ship repairman, shipbuilder, shipbreaker." 442 U.S. at 273.

This Court emphasized, however, that not everyone in the "situs" area was covered and quoted from the Senate and House Committee Reports on the 1972 amendments, 442 U.S. 432 at 266, footnote 27:

> " 'The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. *The Committee does not intend to cover employees who are loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.* Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged,

> in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." S.Rep. 13: HR Rep. 10-11.' " (Emphasis supplied)

Pfeiffer further expanded on *Caputo* and reemphasized that to determine whether a worker was entitled to benefits under the LHWCA for engaging in "maritime employment" required the application of an occupational test.

Pfeiffer, like *Caputo*, involved two employees. Ford was a warehouseman injured on a public dock while fastening military vehicles, which had been delivered to the port by a ship, onto a railroad flat car. Bryant was a cotton header injured while unloading cotton, which had arrived by a ship, from a dray wagon into a pier warehouse.

This Court held both Ford and Bryant to be "employees" under the LHWCA because they were part of the loading and unloading process and because both men were engaged "in the type of duties that longshoremen perform in transferring goods between ship and land transportation." 444 U.S. at 81.

While noting that the term "maritime employment" was not limited to longshoring operations (444 U.S. at 77, footnote 7), the Court stated:

> "The legislative history discusses workers solely in terms of what they are doing and never in terms of where they are working." 444 U.S. at 80.

The injured worker in this case, Carroll, was not a longshoreman. He was not involved in the process of unloading

vessels, as were the workers in *Caputo*. He was not involved in the process of moving cargo, as were the workers in *Pfeiffer*. He was not even involved in repairing machinery that was to be used in the loading or unloading of a vessel. He was not employed by a stevedoring or longshoring operation. His sole task was to erect and dismantle scaffolding to be used by others.

The Court of Appeals' holding that Carroll was engaged in "maritime employment" eliminates the occupational test of status embodied in the Act. The Court of Appeals concluded that because Carroll's work involved his presence in the "situs" area and because it tangentially involved a pier, he was therefore engaged in "maritime employment."

Under the Court of Appeals' reasoning, coverage would be extended not only to who one, like Carroll, erects scaffolding, but one who merely brings the scaffolding materials out to the pier. It would extend coverage to one who changes a light bulb on a pier. It would extend coverage to one who brought a ladder on to a pier so that another may change a light bulb.

As used by the Court of Appeals, the term "maritime employment" becomes not an occupational test but rather one in which a maritime occupation is deduced from the situs of the injury. It is neither apparent nor logically imperative to conclude that the erection of scaffolding on which others may stand to perform repairs to a turntable is encompassed in the undefined phrase "maritime employment." Indeed, the scaffolding erection process is far more removed from traditional maritime activities than those activities that the House and Senate Committee Reports indicated would

not be subject to coverage, such as employees engaged in further trans-shipment of stored cargo. The process of scaffolding erection cannot be considered "traditionally" maritime in nature. It is not the type of work in which one could expect longshoremen, shipbreakers, or harbor workers to engage.

The Court of Appeals was apparently concerned that any other holding would encourage "the use of 'non-maritime' independent contractors to perform segmented portions of maritime repair projects . . ." 650 F.2d at 758. This fear is groundless. Those employees engaged in "traditional maritime activities" will still be covered in any event, regardless of whether their employer is an independent contractor. For example, a maintenance man who works on shiploading equipment directly and even has occasion to go aboard ships to assist directly in the loading or unloading process would clearly be covered by the Act, as was found in the case of *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30 (1st Cir. 1980), cert. denied ____ U.S. ____, ____ L.Ed. 2d ____, 101 S.Ct. 3080 (1981).

Likewise, an employer could not be able to benefit by dividing his employees into "non-maritime" and "maritime" groups. In *Odom Construction Co. v. United States Department of Labor*, 622 F.2d 110 (5th Cir. 1980), an employee engaged in removing obstructions from a navigable canal was properly held to be engaged in maritime work, even though he was a member of an ostensibly "non-maritime" crew.

Further, if an employee's actions are indisputably maritime in nature at the time of his injury, it should be irrelevant what percentage of his time is spent in non-maritime activities.

Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346 (5th Cir. 1980).

But if an employee is not engaged in the loading, unloading, building or repairing of a vessel, if his employer is not a stevedoring or longshoring corporation, and if the employee does not have occasion to walk "in and out" of coverage (as would have been the case prior to the 1972 amendments to the Act), to hold that he is nonetheless covered by the LHWCA because his injury occurred on a pier emasculates the "status" test.

If the Court of Appeals' opinion is allowed to stand, the old "water's edge" line (as enunciated in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 [1969]), which employers had attempted to use as a shield, and which line was erased by the 1972 amendments to the Act, will be resurrected as a sword for employees to wield in an attempt to assert coverage under the Act.

Both the Second Circuit and the Fourth Circuits have recognized that all geographic considerations must be eliminated in determining whether an employee meets the "status" test. *Fusco v. Perini North River Associates*, 622 F.2d 1111 (2nd Cir. 1980), on remand from 444 U.S. 1028, 100 S.Ct. 697, 62 L.Ed. 2d 664, held that a worker engaged in the construction of a sewerage plant over navigable waters was not a covered "employee":

> "While the *Ford* case does not deal with construction workers and the opinion does not address itself to the question of whether the 1972 amendments had the effect of depriving any class of workers of benefits it would have enjoyed under the pre-1972 law, we read the opinion

> as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." 622 F.2d at 1113.

Likewise, in *Conti v. Norfolk and Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), it was held that railway brakemen were not covered by the LHWCA even though they were injured in a "situs" area while working on coal cars that brought materials to ships. As the Court stated at 566 F.2d 895:

> "It is clear that in the cases before us the occupations of the plaintiffs were not of a traditional maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not a vessel."

To paraphrase *Conti*, Carroll's task of erecting and dismantling scaffolding would have been the same on or off a pier, and the fact that others (not employees of Hullinghorst) were to use the scaffolding to repair a turntable on a pier should not obscure the basic fact that Carroll was engaged in carpentry work, not traditional maritime employment.

It is submitted that the Court of Appeals' holding in this case, while paying lip service to *Caputo* and *Pfeiffer*, actually refuses to recognize the occupational nature of the "status" test by using a criterion so broad that it vitiates any meaning-

ful separate inquiry if the worker is injured over navigable waters.

THE COURT OF APPEALS ALSO ERRONEOUSLY REJECTED THE ARGUMENT THAT THERE IS A SEPARATE INDEPENDENT "EMPLOYER" TEST THAT MUST BE MET UNDER THE ACT

The Court of Appeals held that in 1972 amendments rendered the "employer" status requirement "largely tautological." 650 F.2d at 758 (App. A). This holding is contrary to the express congressional intent behind the 1972 amendments. Both the Senate and House Committee Reports contain the following language:

> "Likewise, the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." Senate Report 92-1125, pg. 13; House Report 92-1441, at pg. 11.

It is clear that, but for the Court of Appeals' holding that Carroll was engaged in "maritime employment," Hullinghorst Industries, Inc. has no other nexus with maritime activities and has no other employees engaged in the loading, unloading, building, or repairing of any vessel.

The retention in the 1972 amendments of the phrase "maritime employment" in the definition of "employer," and

the addition of the phrase "maritime employment" to the definition of "employee" indicates that Congress did not intend to create a definition of "employer" that could be ignored once one had determined that a worker fit the "employee" requirements. Since Hullinghorst Industries is not an "employer" (if one excludes Carroll's scaffolding activities) it is not subject to coverage under the LHWCA.

CONCLUSION

The Court of Appeals' holding that Carroll is an "employee" under the LHWCA is in conflict with this Court's holding in both *Caputo* and *Pfeiffer*. To allow the Court of Appeals' decision to stand would rob the "status" test of any meaning because the appellate court's rationale would allow those who have the most peripheral and attenuated connection with maritime activities to be covered by the LHWCA merely because they were injured in a "situs" area. The Court of Appeals' holding further conflicts with the express congressional intent behind the 1972 amendments to *not* cover "employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

This petition for certiorari should be granted.

Respectfullly submitted:

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CERTIFICATE

PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared John Dale Powers, who, after being duly sworn, did state:

I am a member of the Bar of the Supreme Court of the United States. I certify that on this day I have personally supervised the mailing of 40 copies of this petition for certiorari and that these copies were deposited today in a United States Post Office mail box, with first class postage prepaid and properly addressed to the Clerk of this Court. I further state that this mailing took place within the time permitted by 28 U.S.C. §2101.

I further certify that 3 copies of this petition for certiorari have been sent to each of the following individuals by depositing copies of these documents in a United States Post Office mail box, with first class postage prepaid and properly addressed to the following individuals:

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SWORN TO AND SUBSCRIBED before me this_____ day of October 1981, at Baton Rouge, Louisiana, and before the undersigned competent witnesses.

Original signed by John Dale Powers,
witnessed by Vickie Sanders and
David M. Vaughn and notarized
Michael H. Rubin on October 9, 1981

Notary Public

81-693

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APPENDIX

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APPENDIX A

HULLINGHORST INDUSTRIES, INC.,

Petitioner,

v.

David E. CARROLL, and Director, Office of Workers' Compensation Programs,

U.S. Department of Labor, Respondents.

No. 80-3116.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 16, 1981.

Before CHARLES CLARK, TATE and WILLIAMS, Circuit Judges.

TATE, Circuit Judge:

Hullinghorst Industries, Inc. appeals from a decision of the Benefits Review Board awarding benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, to David E. Carroll, an injured Hullinghorst employee. The appeal is based on two contentions:[1] First, that the Board erred in concluding that Carroll was a covered employee within the meaning of the Act, and second, that the Board erred in affirming the administrative law judge's conclusion that there was a connexity between Carroll's injury and his subsequent disability.

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[1] Hullinghorst has withdrawn a third contention, conceding it to have been "mooted" by the recent decision of the United States Supreme Court in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980).

Our review of the record before us discloses no legal error in the Board's decision. It is therefore, in all respects affirmed.

Facts

This appeal is brought on undisputed facts.

David E. Carroll, the compensation claimant, suffered a back injury while erecting a scaffold beneath a pier extending out over the Mississippi River.

The pier was part of a port facility owned and operated by the BASF Wyandotte Corp. (Wyandotte) in Geismar, Louisiana. The sole purpose of the scaffold was to provide a place for Wyandotte employees to stand in order to repair a turntable (a piece of equipment used by Wyandotte in the loading and unloading of vessels) that had been damaged by a ship.

Carroll was not a Wyandotte employee and was to have no direct role in the actual repair work on the turntable. He was employed as a carpenter by Hullinghorst Industries, Inc. (Hullinghorst), which acted solely as the scaffolding subcontractor at the Wyandotte port facility. Neither Hullinghorst nor any of its employees (including Carroll) participated directly in the loading, unloading, building, repair, or breaking of any vessel. Indeed, Hullinghorst (and Carroll) did nothing but erect scaffolding for whatever purpose needed at the Wyandotte facility.

Following his injury, Carroll filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, with the United States Department of Labor (DOL).[2]

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[2] Previously, on August 8, 1975, Carroll filed suit against Hullinghorst and Wyandotte in the United States District Court for the Eastern District of Louisiana—an action dismissed for lack of subject matter jurisdiction on May 28, 1976. Carroll also filed suit in state court on February 25, 1976, seeking benefits under Louisiana's workmen's compensation statute. Those actions have no direct bearing on the issues presented to this court.

Initially, the administrative law judge (ALJ) denied benefits to Carroll on the ground that he was not an "employee" within the meaning of the Act. The Director of DOL's Office of Workers' Compensation Programs appealed that decision to the Benefits Review Board (Board). The Board reversed the ALJ's determination that Carroll was not a covered employee under the Act and remanded the case for determination of the amount of compensation due.

The ALJ's determination on remand was upheld by the Board, and Hullinghorst petitions for review of the Board's final order.

I. *Scope of Review*

The scope of our review of the Board's determinations is relatively narrow: We are to review for errors of law, and to assure that the Board has adhered to its statutory standard of review of factual determinations. *Alford v. American Bridge Div., U. S. Steel Corp.*, 642 F.2d 807, 809 (5th Cir. 1981) (petition for rehearing pending, on denial of coverage to worker who spent some portion of his time in shipbuilding activities, but who was not engaged in shipbuilding activities at the time of his injury); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976).

Under the terms of the Act, 33 U.S.C. § 921(b)(3), the findings of fact by the ALJ are "conclusive if supported by substantial evidence." The Board is thus constrained to accept the factual findings of the ALJ unless they are irrational or are unsupported by substantial evidence in the record as a whole. *Alford v. American Bridge Div., U. S. Steel Corp., supra*, 642 F.2d at 809; *Presley v. Tinsley Maintenance Service, supra*, 529 F.2d at 436. In addition, the ALJ's selection of reasonable conflicting factual inferences is conclusive upon the Board if supported by the evidence and not inconsistent with the law. *Alford v. American Bridge Div., U. S. Steel Corp., supra*; *Presley v. Tinsley Maintenance Service, supra.*

In accord with these principles, we reject at the outset Hullinghorst's contention that the Board exceeded its statutory authority in reversing the determination of the ALJ that Carroll was not a covered employee within the meaning of the Act. Under the uncontested facts, the ALJ's determination in this regard was neither a finding of fact nor a factual inference drawn from the evidence. It was a conclusion of law. As such, it was subject to reversal by the Board as legally erroneous, and is open to review by this court on appeal. It is clear from the Board's opinion that it did not in any wise reject the ALJ's findings or inferences of fact. To the contrary, it expressly accepted them and reached on that predicate a contrary legal conclusion. Such action is well within its statutory power. *See Presley v. Tinsley Maintenance Service*, *supra*, 529 F.2d at 436-37.

II. *Coverage*

In construing the coverage provisions of the Act, 33 U.S.C. § 903(a)[3] this circuit has identified three controlling jurisdictional requirements: (1) The injured claimant must have "employee" status as defined by 33 U.S.C. § 902(3);[4] (2) his injury must have occurred on the "navigable waters" situs described in § 903(a); and (3) the claimant's employer must qualify as an "employer" within the meaning of 33 U.S.C. § 902(4).[5] *Alford v. American Bridge Div., U. S. Steel Corp.*,

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[3] Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .
33 U.S.C. § 903(a).

[4] The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
33 U.S.C. § 902(3).

[5] The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier,

supra, 642 F.2d at 810-11. As to (3), however, *see Trotti & Thompson v Crawford*, 631 F.2d 1214, 1216 & n.5 (5th Cir. 1980) and discussion in text at note 8 *infra*.

It is not disputed that the situs requirement of the Act is satisfied—the injury did occur on the navigable waters of the United States, as described in § 903(a). The focus of the parties' contentions is upon Carroll's *status* as an "employee" within the meaning of § 902(3).

a. "Employee" status.

The essential element of the status requirement is that the claimant must be "engaged in maritime employment." 33 U.S.C. § 902(3). The requirement is occupational rather than geographic, *P. C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 78-81, 100 S.Ct. 328 335-36, 62 L.Ed.2d 225 (1979), and encompasses occupations beyond those enumerated in the Act, *P. C. Pfeiffer Company, Inc. v. Ford, supra*, 444 U.S. at 77 n.7, 100 S.Ct. at 334 n.7; *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 265 n.25, 97 S.Ct. 2348, 2358 n.25, 53 L.Ed.2d 320; *Trotti & Thompson v. Crawford, supra*, 631 F.2d at 1220; *Odom Construction Co. v. United States Dep't of Labor*, 622 F.2d 110, 112 (5th Cir. 1980), *cert, denied*, —— U.S. ——, 101 S.Ct. 1482, 6 L.Ed.2d 614 (1981). In addition, "employee" status under the Act may be based *either* upon the maritime nature of the claimant's activity at the time of his injury *or* upon the maritime nature of his employment as a whole. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 844 (5th Cir. 1978), *cert. denied*, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979). *See also Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 511 (5th Cir. 1980) (*en banc*); *Odom Construction Co. v. United States Dep't of Labor, supra*, 622 F.2d at 113. Thus, a claimant will meet the status require-

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wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).
33 U.S.C. § 902(4).

ment of the Act, not only if he is engaged in "maritime employment" at the time of injury, but also if he spends some portion of his overall employment engaged in martime activities. *See, e.g., Howard v. Rebel Well Service*, 632 F.2d 1348 (5th Cir. 1980); *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346 (5th Cir. 1980).

The term "maritime employment" is not defined in the Act. The basic elements of that status were articulated by this court in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 539-40 (5th Cir. 1976), *vacated and remanded in part sub nom. P. C. Pfeiffer Company, Inc. v. Ford*, 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977), *reaff'd on remand*, 575 F.2d 79 (5th Cir. 1978) (*per curiam*), *aff'd sub nom. P.C. Pfeiffer Company Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979):

> "[A]n injured worker is a covered "employee" if . . . (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work."

See also Thibodaux v. Atlantic Richfield Co., supra, 580 F.2d at 844 (establishing alternative test of either time of injury or overall occcupation). The *Jacksonville Shipyards* panel expressly left open the possibility of future expansion of coverage to include

> "other types of . . . work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not 'directly involved' with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme."

Jacksonville Shipyards, Inc. v. Perdue, supra, 539 F.2d at 540 n.18.

Subsequent cases have followed the *Jacksonville Ship-*

yards "direct involvement" test, construing it liberally in order to further the compensatory purposes of the Act.[6] Thus, coverage has been extended on the basis of "employee" status to a worker (who had never worked aboard a ship) injured while cleaning a piece of steel to prepare it for fabrication into a shipbuilding component, *Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61, 62 (5th Cir. 1977) (cleaning was "necessary prerequisite to the fabrication of the steel" and thus was "an essential step of the shipbuilding process"); to a worker injured while sandblasting a disassembled crane to prepare it for use in shipbuilding, *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.) (repair and maintenance of machines used in shipbuilding is an "essential aspect" of the shipbuilding business), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977); to a worker who maintained and repaired tools and equipment used in loading and unloading ships, *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 247 (5th Cir.) (maintenance and repair of longshoring tools and equipment is a "continuous and direct involvement with maritime activities"), *modified in part on rehearing on other grounds*, 561 F.2d 1213 (5th Cir. 1977), *aff'd on rehearing en banc on other grounds*, 632 F.2d 504 (5th Cir. 1980); to a landbased construction worker injured while removing concrete blocks used as moorings from navigable waterway, *Odom Construction Co. v. United States Dep't of Labor*, *supra*, 622 F.2d at 113 (removal of blocks "directly furthered maritime commerce" and had "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . ."); and to a landbased carpenter injured while working on the initial construction of a pier, *Trotti & Thompson v. Crawford*, *supra*, 631 F.2d at 120 (claimant's work "directly furthered" the

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[6] *E. g., Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 246 (5th Cir.), *modified in part on rehearing on other grounds*, 561 F.2d 1213 (5th Cir. 1977), *aff'd on rehearing en banc on other grounds*, 632 F.2d 504 (5th Cir. 1980) (*en banc*); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268-72, 97 S.Ct. 2348, 2359-61, 53 L.Ed.2d 320 (1977).

maritime goals of the port, and initial construction cannot be distinguished from pier repair under the Act).

These decisions are dispositive of the status issue raised on this appeal. This court has made it clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of "maritime employment" as that term is used in the Act. *Odom Construction Co. v. United States Dep't of Labor*, *supra*, 622 F.2d 110 (5th Cir. 1980) (restoration of mooring facilities); *Texports Stevedore Co. v. Winchester*, *supra*, 554 F.2d 245 (5th Cir. 1977) (maintenance and repair of longshoring tools and equipment); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, *supra*, 554 F.2d at 176 (5th Cir. 1977) (maintenance and repair of shipbuilding equipment). *See also Trotti & Thompson v. Crawford*, *supra*, 631 F.2d 1214 (5th Cir. 1980) (no distinction under the Act between pier construction and pier repair).

The scaffolding work at issue in the present case was part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships. Under the authority of the cases cited in the preceding paragraph, that project was indisputably maritime in nature.

Hullinghorst contends, however, that the present case is distinguishable from those "maintenance and repair" cases. Hullinghorst argues that Carroll was to play no *direct* role in the actual repair work on the turntable. Thus, Carroll was not engaged in the maintenance or repair of longshoring equipment, but was merely utilizing his essentially nonmaritime carpentry skills to build a scaffold that would be used by others in the repair of longshoring equipment.

We do not choose to split this particular hair. Carroll's work in erecting the scaffolding was an integral part of an

indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. It was not merely "incidental" to that project, *see Dravo Corp. v. Banks*, 567 F.2d 593, 595-96 (3d Cir. 1977) (unskilled laborer spreading salt on ice at shipyard not engaged in maritime employment), nor was it the type of job "peripherally related to maritime matters that Congress said was not to be covered by the LHWCA, such as trans-shipment of stored cargo or clerical work," *see Odom Construction Co. v. United States Dep't of Labor*, *supra*, 622 F.2d at 113. It was an integral step in a maritime project of the type that could be performed by a typical harborworker. *See id.* at 112. It directly furthered the maritime goals of the Wyandotte port facility—the loading and unloading of ships. *See Trotti & Thompson v. Crawford*, *supra*, 631 F.2d at 1200. It clearly bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . ." *Odom Construction Co. v. United States Dep't of Labor*, *supra*, 622 F.2d at 113. That the skills utilized by Carroll were "essentially nonmaritime" in character is immaterial. It is the purpose of the work that is the key; "nonmaritime" skills applied to a maritime project *are* maritime for purposes of the "maritime employment" test of the Act. *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 997-98 & n.7 (5th Cir. 1981); *Trotti & Thompson v. Crawford*, *supra*, 631 F.2d at 121 nn.15, 16. *See Odom Construction Co. v. United States Dep't of Labor*, *supra*, 622 F.2d at 112-13.

Nevertheless, Hullinghorst contends that the present case differs from the previous "maintenance and repair" cases of this circuit in yet another important respect: Hullinghorst, unlike the employers in those earlier decisions, is not shown to have had any maritime involvement other than that arising from the disputed activity of the claimant in this action. In sum, Hullinghorst argues that the cases granting coverage fall into three general categories (1) Those granting coverage to *longshoremen* injured while performing some segmented

portion of the longshoring operation to the landward side of the cargo's first point of rest; (2) those granting coverage to workers whose overall *employment* was indisputably maritime, but who were injured while performing allegedly non-maritime tasks; and (3) those granting coverage to workers injured while performing "borderline" activities that directly furthered the indisputably maritime goals of their own employers. Thus, Hullinghorst argues, the maintenance and repair of longshoring equipment and port facilities falls within the scope of "maritime employment" only when the equipment or facilities are used by the claimant's own employer in some indisputably maritime operation.

Without disputing the accuracy of Hullinghorst's description of the factual situations that have previously arisen in this circuit, we nevertheless conclude that the Act imposes no such restriction. A very similar argument was raised in the *Odom Construction Co.* case in the context of the Act's situs requirement. There, the employer contended that the phrase "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" meant that the situs requirement was satisfied only if the site of the injury were used by the claimant's own employer for one of the indisputably maritime activities mentioned in the Act. This court rejected that argument:

> "Odom's suggestion that coverage would be available only if it, the employer used the mooring blocks is both an inappropriately strained reading of the statute and contrary to the overall Congressional intent. The stated limitation is cast in terms of *an* employer, not *the* employer or *the claimant's* employer. A more reasoned interpretation is that the site must be used by a statutory employer. It is clear from the record and the findings below that Domtar Salt, which uses the blocks as an integral part of its facilities for loading salt onto barges, is a statutory employer.
>
> "In addition, it seems clear to us that the phrase

> 'customarily used by an employer . . .' was inserted to ensure that an employer could be liable only when it had real or constructive notice that an area was used for maritime purposes and was therefore likely to be a covered situs. This notice function would not be aided substantially by requiring the claimant's employer to be the customary user, as illustrated by the fact that Odom makes no claim here that it did not know about Domtar's use of the site.
>
> "Moreover, the appellant's interpretation would open up a significant loophole in the LHWCA since there would be no coverage if the customary user of an area simply hired various independent contractors on a short-term basis to perform the necessary work. (The individual independent contractors presumably would not qualify as customary users.) This gap in coverage would be especially large if the limiting language applies to all shore-side sites. Such a result would be inconsistent with the professed Congressional intention for exclusive uniform coverage. Thus we accept the findings below that Maze was injured in a situs covered under 33 U.S.C. § 903(a)."

Odom Construction Co. v. United States Dep't of Labor, *supra*, 622 F.2d at 114-15 (footnote omitted).

For similar reasons we reject the selfsame argument here raised in the context of the Act's status requirement. To be sure, the degree to which an employer is involved in maritime operations independently of the disputed activities of the injured claimant is a factor—and often a substantial factor— to be considered in determining whether the claimant is himself engaged in "maritime employment" within the meaning of the Act. *See, e.g., Trotti & Thompson v. Crawford*, *supra*, 631 F.2d at 1221-22. It is not, however, a necessary prerequisite to a finding of such employment. *See, e. g., Boudloche v. Howard Trucking Co.*, *supra*, 632 F.2d 1346 (5th Cir. 1980). Nothing in the language of the Act, however, would suggest a requirement that an employee injured in what would otherwise be considered maritime employment would nevertheless be barred from recovery because his employer was performing functions

that were an integral part of indisputably maritime activity that was conducted by *another*, and not by the employer itself. Indeed, so to hold would read into the *status* requirement the very restriction rejected from the *situs* requirement in *Odom Construction Co., supra.*

As this court noted in *Odom*, Congress intended that liability should be imposed only where the employer had real or constructive notice of the likelihood of coverage. Where, as here, an employer assigns his workers to a project that is maritime in nature (pier repair) and that is conducted on a maritime situs (a pier), he has sufficient notice of the likelihood of coverage. This notice function would not be enhanced by requiring the injured claimant's employer to be the customary user of the maritime worksite or the ultimate beneficiary of the repairs. Furthermore, acceptance of Hullinghorst's position in this regard would open up the very loophole the *Odom* panel sought to close, by encouraging the use of "nonmaritime" independent contractors to perform segmented portions of maritime repair projects such as the one in question here. Such a result is no less inconsistent with the professed congressional intent to provide uniform coverage when it arises in the context of the *status* requirement than when it arises in the context of the *situs* requirement. Indeed, the policy of liberal construction of the Act counsels strongly against allowing the segmentation of maritime operations and the use of independent contractors to defeat coverage where otherwise it would clearly lie.

We conclude that Carroll was engaged in maritime employment at the time of his injury, and that he is therefore a covered employee within the meaning of the Act.

b. "Employer" status.

Hullinghorst also argues that a second independent prerequisite to coverage under the Act is lacking in the present

case: Hullinghorst does not qualify as a statutory "employer" within the meaning of § 902(4).

As defined in § 902(4), a statutory "employer" is "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [as described in 33 U.S.C. § 903(a)]." (*See* note 5.) That definition has remained essentially unchanged since the original passage of the Act in 1927.[7]

Prior to the 1972 amendments to the Act, the notion of a separate and independent "employer" status requirement had some significance in the coverage scheme. Under the predecessor 1927 Act, coverage was extended on the basis of *situs* only—thus, a claimant injured upon the navigable waters of the United States (as then defined) would be eligible for the Act's compensation, even though he was not himself engaged in maritime employment, so long as his employer had at least one worker who was so employed. *See Northeast Marine Terminal Co., Inc. v. Caputo, supra*, 432 U.S. at 264-65, 97 S.Ct. at 2357.

With the addition of the "employee" status requirement in the 1972 amendments, however, the "employer" status requirement of the old Act has been rendered largely tautological. Now the injured claimant must himself be engaged in maritime employment. Thus, as this court noted in *Jacksonville Shipyards, Inc. v. Perdue, supra*, 539 F.2d at 538, n.9, if the injured claimant meets the status and situs requirements embodied in § 903(a) and § 902(3), his employer would automatically qualify as a statutory "employer" within the meaning of § 902(4); if the claimant fails to meet either of those

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[7] The definition of "employer" contained in § 902(4) was changed in the 1972 amendments to the Act so as to reflect the expanded definition of "navigable waters of the United States" incorporated by those amendments into § 903(a). *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264 n.23, 97 S.Ct. 2348, 2357 n.23, 53 L.Ed.2d 320 n.23 (1977).

requirements then it is immaterial whether the employer would qualify as a statutory "employer" or not.[8]

Accordingly, having determined that Carroll was engaged in maritime employment upon the navigable waters of the United States at the time of his injury, we conclude that it necessarily follows that Hullinghorst, his employer, is a statutory "employer" within the meaning of the Act.

III. *Connexity Between Injury and Disability*

Hullinghorst's final contention is that the Board erred in upholding the ALJ's finding that a causal relationship existed between the injury and Carroll's subsequent disability.

As we have noted, the findings and inferences of the ALJ are conclusive upon the Board unless they are irrational, unsupported by substantial evidence in the record as a whole, or inconsistent with the law; and our review of the Board's determination is limited to reviewing for legal error and to ascertaining that the Board adhered to its statutory standard in its own review of the facts. *Presley v. Tinsley Maintenance Service, supra*, 529 F.2d at 436. *See* 33 U.S.C. § 921(b)(3).

Our examination of the record reveals substantial evi-

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[8] We find no decision of this circuit which holds that "employer" status may not be predicated upon the status of the injured claimant as a maritime employee under the Act. Pre-amendment cases are to the contrary. *See e.g., Nalco Chemical Corp. v. Shea*, 419 F.2d 572, 574 (5th Cir. 1969).

Indeed, there is some question as to the existence of a separate and independent "employer" status requirement, as a jurisdictional confine, at all. *See Trotti & Thompson v. Crawford*, 631 F.2d 1214, n.5 (5th Cir. 1980). The only case expressly recognizing such a requirement (since the enactment of the 1972 amendments) is *Alford v. American Bridge Div., U. S. Steel Corp.*, 642 F.2d 807, 810-11 (5th Cir. 1981) (petition for rehearing pending), which did not discuss the requirement in any depth.

We do not doubt that an injured claimant's employer must be an "employer" as that term is defined in the statute. We simply note that, in the context of the 1972 amendments, it does not represent the sort of "jurisdictional confine" that is embodied in the *situs* and "employee" *status* requirements.

dence to suport the ALJ's conclusion that Carroll's disability resulted from his injury at the Wyandotte port facility on December 12, 1972.

Carroll testified that he felt something "pop" in his lower back while lifting material at his jobsite on December 12, and that he has suffered severe pain and restricted mobility from that moment on. Prior to that date, he experienced no symptoms whatsoever. Since that date, he has been totally unable to work.

Carroll was examined on December 22, 1971, by Dr. Stephen M. Wilson, an orthopedic surgeon, and on January 11, 1973, by Dr. William L. Fisher, Jr., a neurosurgeon. Both doctors testified that Carroll reported subjective symptoms, but that physical examinations and a myelogram revealed no objective evidence of the herniated disc from which his disability arises. Both doctors testified, however, that falsely normal results were possible in such cases, and Dr. Fisher indicated that up to fifteen percent of myelograms might show falsely normal results. Neither physician could rule out the possibility that a herniated disc existed at that time.

Carroll testified that he continued to suffer pain and restricted mobility, and that he consulted Dr. Jack F. Loupe, an orthopedic surgeon, on September 14, 1973. Dr. Loupe's initial examination revealed the herniated disc. Carroll subsequently underwent surgery for the problem on three occasions. Dr. Loupe testified that, assuming the accuracy of the history related by Carroll, it was his opinion that the entire sequence of back problems suffered by Carroll was caused initially by the injury that occurred on December 12.

Dr. Ira L. Hewitt, a specialist in internal medicine consulted by Dr. Loupe in connection with Carroll's surgery, began treating Carroll for a heart condition in September of 1973. Dr. Hewitt testified that the heart condition could have

been precipitated by the stress, anxiety, and pain attendant to the kind of injury described by Carroll.

Hullinghorst does not contend that this evidence is insufficient to support the ALJ's conclusion. Instead, it argues that the ALJ erred in placing greater weight on the testimony of Carroll and Drs. Loupe and Hewitt than on the testimony of Drs. Wilson and Fisher. In essence, Hullinghorst's position is that the medical testimony relied upon by the ALJ is less credible than the medical testimony tending to counter it. Such an argument fails by reason of the applicable limitations upon judicial review, if for no other reason. The ALJ is not bound to accept the opinion of any particular medical expert; he is entitled to weigh the medical evidence—including the relative credibility of the competing experts—and to draw from that evidence the inferences he deems most reasonable in light of the evidence as a whole and the common sense of the situation. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 741-42 (5th Cir. 1962). As this court noted in *Presley*, *supra*:

> "That the facts may permit diverse inferences is immaterial. The administrative law judge alone is charged with the duty of selecting the inference which seems most reasonable and his choice, if supported by the evidence, may not be disturbed."

Presley v. Tinsley Maintenance Service, *supra*, 529 F.2d at 436.

We find in the record no basis for disturbing the factual findings and inferences drawn by the ALJ that Carroll's disability—arising from a herniated disc and a heart condition—resulted from the injury he suffered on the Wyandotte pier on December 12, 1972.

Conclusion

We find no legal error in the determination of the Bene-

fits Review Board that claimant David E. Carroll suffered a disabling injury while engaged in maritime employment. Accordingly, the Board's award of federal compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, is AFFIRMED.

AFFIRMED.

APPENDIX B

In the Matter of

DAVID E. CARROLL

Claimant

v.

HULLINGHORST INDUSTRIES, INC.

and/or

BASF WYANDOTTE CORP.

Employer

Case No. 76-LHCA-652

OWCP No. 7-34955

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For the Employer, Hullinghorst Industries, Inc.

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation and other benefits under provisions of the Longshoremen's and Harbor Workers' Com-

pensation Act as amended, 33 U.S.C. 901 *et seq.*, (hereinafter referred to as the Act), and the regulations governing the administration of the Act, 20 CFR 701 and 702. The claim was heard at a formal hearing before me on July 1, 1976 at Baton Rouge, La. The main issues in the case involved jurisdiction under the Act, the nature and extent of the claimant's injury, and whether there was a causal relationship between the claimant's physical condition and his accident of December 12, 1972. The firm of BASF Wyandotte Corporation (hereinafter called Wyandotte) was not represented by counsel at the hearing, although a copy of the Notice of Hearing had been sent to that firm.[1]

The parties stipulated to the following matters, which I find to be established: there was an employer-employee relationship between the claimant and Hullinghorst Industries, Inc. on December 12, 1972, on that date the claimant's average weekly wage was $182.81, compensation has been paid to the claimant under provisions of the Louisiana state compensation act in the amount of $6,223., all notice and filing requirements were timely made, and Hullinghorst Industries, Inc. does not have workmen's compensation insurance under requirements of the Act.

The claimant is 34 years of age, married, and he has three children. He has a tenth grade education. He was a carpenter and, on December 12, 1972, he was in the employ of the respondent, Hullinghorst Industries, Inc., building a scaffold on a pier over the waters of the Mississippi River at Geismar, La. The scaffold was to be used as a place on which workmen could stand in order to repair a turntable which had been damaged by a ship which had accidently bent and torn it when the ship left. The turntable was owned by Wyandotte and was used to load ships in the river. It was

[1] In view of the parties' stipulation that Hullinghorst Industries, Inc. was the claimant's employer, and the evidence to that effect, no counsel for Wyandotte was really required.

located on the edge of the dock over the water and, when operable, its loading pipe could be swung or swivelled from one hold of a ship to another or from one barge to another. It was located about 200 yards from the levee and there was a metal catwalk from the top of the levee to the turntable.

The claimant's job and that of his crew was not to repair the turntable or the pier; it was solely to build a scaffold upon which other workers, such as pipefitters or ironworkers, and perhaps insulators, could stand and do the repair work, then at a later time the claimant and his crew would have the job of tearing this scaffold down. Neither the claimant nor any other employees of Hullinghorst Industries, Inc. were engaged in any way with building, repairing, loading or unloading any vessel. Employees of Wyandotte normally did the loading and unloading. Hullinghorst had contracted with Wyandotte to do certain insulation maintenance work for Wyandotte, and this work included the scaffold job the claimant was performing at the time of his injury.

The crew, which included a foreman, the claimant, his brother and another worker, picked up some tubing scaffolding, bulk scaffolding, tubing handrails and scaffold boards, transported these by truck to the top of the levee and carried the materials by hand from the levee down the catwalk to the end of the pier, near the turntable. They built the scaffolding about 14 feet high, then took some tubing and boards and clamped or tied these with wire to the floor or deck of the pier. The claimant was handing up the last board for the decking of the scaffolding to his brother when "something popped" in his back, he said it felt like a knife had gone into his backbone, and he fell to his knees. He told his brother that something had happened to his back. His brother said they only needed the handrails to finish the job, so the claimant, while on his knees, handed up the three small pieces of tubing, then his brother came down off the

scaffold and helped the claimant to a shack, there on the dock. His brother and the foreman later helped the claimant back up the catwalk to the truck. The claimant did not eat lunch. After his fellow crew members ate they drove him to the nurse's station. The nurse gave him some muscle relaxants, then she called the supervisor, who had the claimant driven to the Lady of the Lake Hospital, nearby. There, he was seen by a Dr. Rathbone who prescribed more muscle relaxants and heat and sent him home.

The claimant's back continued to hurt and he was admitted to the hospital for three days. He was put in traction there by Dr. Stephen M. Wilson, and later given a myelogram by Dr. William L. Fisher, Jr. Following the myelogram he was sent home, despite a painful headache and aching back. Several days later, when the headache had let up a little, the claimant reported back to work. He did not actually perform any work because of his back, but was allowed to stay at the job site and draw his pay, while the other members of his crew did the work that was to be done. He laid flat on his back in the truck going to and from work and in a shack at the job site. Finally, after 11 days of this, from about December 12, 1972 to December 28, he was terminated, since he was unable to do the work and the crew had a lot of work to be done. Following this, he applied for and received social security payments and some workmen's compensation under the state act.

The claimant was seen by a neurosurgeon, Dr. Levert, and a Dr. Rivet, who reexamined the results of the myelogram and x-rays Dr. Fisher had taken and a ruptured disc was discovered. One of these doctors was scheduling the claimant for an operation, but dropped the matter when he found the claimant had begun to consult an attorney. The claimant then went to Dr. Jack F. Loupe who performed another myelogram, x-rayed the claimant and found a ruptured disc. Meanwhile, the claimant had been spending most

of his time in bed at home and he had developed pains in his chest and arms. He had no income during this period. Dr. Ira L. Hewitt examined him and discovered he had heart trouble.

Dr. Loupe performed two disc operations on the claimant in September 1973 and April 1974. The latter's back still bothers him and, although Dr. Loupe says he needs another operation, the claimant is too nervous and afraid to have it because he does not think he would live through it. Dr. Loupe could not promise anything and he said he did not expect to be able to do a successful fusion, but only hoped to be able to relieve the pain. This time the claimant would rather bear the pain than take the chance, he testified.

He has to take glycerine for his heart condition. He gets exhaused easily and cannot even mow his lawn. Sometimes his chest feels tight, he can hardly breathe, and he cannot lift more than 20 or 30 lbs. He has a driver's license and can drive a car. He cannot stand for prolonged periods of time without his left leg going to sleep and his back aching. Both his legs hurt frequently, his left leg more than his right. When his chest hurts he gets a burning sensation in the middle, then little sharp needle pains start shooting into his left arm. When it hurts badly he calls the doctor who gives him a shot or puts him in the hospital for awhile. Prior to December 12, 1972 he did not have this difficulty and he had taken many physical exams for his previous jobs such as working on oil drilling rigs and on a grain elevator.

A report of Dr. William L. Fisher, Jr., of Baton Rouge, dated January 24, 1973, stated that his examination of the claimant did not reveal any objective findings. A myelogram was found to be completely normal in all respects.

A report of Dr. Stephen W. Wilson of Baton Rouge, dated January 19, 1973, hereby incorporated in the record

and admitted in evidence as Respondent's Exhibit 8, stated that the doctor's impression of the claimant's condition was law back syndrome, but after hospitalization for traction and a myelogram by Dr. Fisher, Dr. Wilson's subsequent examination of the claimant's back and lower extremities did not reveal any positive findings.

A report of Dr. Ira L. Hewitt of Baton Rouge, dated October 4, 1974, hereby incorporated in the record and admitted as ALJ Exhibit 3, stated that the claimant was in a minor automobile accident on September 12, 1974 and sustained an acute coronary failure with severe chest pain, but this apparently resulted in no further damage to his heart and there was no evidence of a myocardial infarction. While Dr. Hewitt thought the claimant's injury of December 12, 1972 was not the basic pathological cause of his coronary heart disease, he thought that this did help to precipitate the earlier manifestation and caused aggravation of his cardiac condition. Another report of Dr. Hewitt dated July 26, 1976, hereby admitted as Claimant's Exhibit 1, stated that, in the doctor's opinion, the claimant's on-the-job injury of December 12, 1972, along with his loss of employment and resulting economic distress, did precipitate the early onset of his heart condition.

A report of Dr. Jack F. Loupe of Baton Rouge, dated December 18, 1973, hereby admitted as ALJ Exhibit 4, noted that the claimant's low back and left leg pain had been improving until about 3 weeks before that time when he had stumbled and fell, resulting in a burning sensation in his low back and left leg with increased low back pain and left sciatic pain. The L4-5 intervertebral disc had narrowed to a moderate degree. In a second report, hereby admitted as Claimant's Exhibit 2, Dr. Loupe stated that he had performed surgery on the claimant for herniated discs twice, once in 1973 and the second time in April 1974. The claimant has continued to experience disabling pain in his lower

back and off and on to some degree in his lower extremities. The claimant had to wear a back brace. In a final report, hereby admitted as Claimant's Exhibit 3, Dr. Loupe stated the claimant was still disabled from his back problems as well as from a cardiac standpoint. He was last seen by Dr. Loupe on May 10, 1976, at which time he had severe incapacitating pain in the lumbar area radiating down to both legs. He was listing to the right and leaning on his arms to keep his weight off. There were severe spasms and restrictions of motion with some weakness of the left foot extensors, which were minimal. Dr. Loupe advised the claimant that should he have an L3 disc protrusion, he might get by without a fusion, with just a removal of the L3 disc. The claimant was to call the doctor's office for possible scheduling of myelogram, disc excision and possible fusion.

Medical bills the claimant alleges amount to $10,540.07, consisting of doctor's bills for $3,619., hospital bills for $6600.55 and drugs or medicines for $320.52, are hereby admitted in evidence, over the respondent's objection, as Claimant's Exhibit 4.[2]

Section 3(a) of the Act provides that:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States, including any adjourning pier, wharf . . ." etc.

Since the evidence indicates the claimant suffered a disability resulting from an injury which occurred on a pier adjoining the Mississippi River, which I can judicially note

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[2] According to the claimant, some, but not all, of these have been paid for by the General Accident Insurance Co., which apparently paid the amounts the claimant received under the Louisiana state compensation act. In view of the disposition of this case, further evidence as to how much of these bills are still outstanding, and other details of the medical expenses will not be required and the request of claimant's counsel for an extension of time to obtain such further evidence is denied.

constitutes navigable waters of the United States, it appears that the situs requirements of the Act are satisfied.

However, the paramount question is whether the claimant meets the definitional requirements of an "employee" under the provisions of the Act. Section 2(3) provides:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship breaker . . ."

Obviously the key phrase in that definition is "maritime employment," and in my opinion the claimant's job at the time of his injury was no more maritime in character than that of any carpenter who builds a scaffold anywhere in the country far from navigable waters.

In *Weyerhauser Co. v. Gilmore*, 528 F.2d 957, at 960 (9th Cir. 1975), the Court of Appeals quoted from the legislative history of the 1972 amendments to the Act, as follows:

> " '[T]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo . . . Committee on Labor and Public Welfare S. Rep. 92-1125 at 13, 92 Cong., 2d Sess. (1972)."

The Court of Appeals in *Weyerhauser* then went on to say this about the term, "maritime employment":

> "The 1972 amended prerequisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over

> the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; *i.e.*, the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of [the Act], an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of 'maritime employment' is nullified and rendered to read 'any employment.'" *Weyerhauser Co. v. Gilmore, supra*, at 961.

Although I am aware that Section 20(a) of the Act contains a presumption that a claim comes within the provisions of the Act, in my opinion, that presumption has been successfully rebutted by substantial evidence to the contrary here. Here, the claimant was not engaged in loading, unloading, repairing or building a vessel, nor was there anything peculiar about his work which would expose him to the same risks as longshoremen who move cargo aboard ship or on the dock. The claimant's work as a carpenter had no realistically significant relationship to traditional maritime activity. It had nothing to do with any vessel or cargo, navigation or commerce.

I find that under the circumstances of this case, the claimant was not a "person engaged in maritime employment" and, thus, not an "employee" within the meaning of Section 2(3) of the Act.[3] *Weyerhauser Co. v. Gilmore, supra*; *Thompson v. Oceanic Container Service, Inc.*, 4 BRBS 140 (ALJ), 76-LHCA-89 (1976); *Hebert v. Barnard & Burk, Inc.*, 74-LHCA-142 (1974); *Thomas v. J. Ray McDermott Co., Inc.*, 4 BRBS

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[3] The evidence also indicates that the claimant's employer, Hullinghorst Industries, Inc., does not meet the requirements of an "employer" within the meaning of the Act, which defines the term as "an employer any of whose employees are employed in maritime employment, in whole or in part . . . ." etc. Section 2(4).

85 (ALJ), 75-LHCA-543 (1976); *Central Engineering Co. v. Bassett*, 42 F.Supp. 750 (S.D. Ill. 1941). Accordingly, the claimant is not entitled to compensation and benefits under provisions of the Act.

ORDER

This claim for compensation and other benefits under the Act is hereby dismissed for lack of jurisdiction.

ROBERT S. AMERY
Administrative Law Judge

Dated: September 27, 1976
Washington, D.C.

APPENDIX C

DAVID E. CARROLL

Claimant

v.

HULLINGHORST INDUSTRIES, INC.

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Petitioner

BRB No. 76-500

DECISION

Appeal from the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan (Alfred G. Albert, Acting Solicitor of Labor, Laurie M. Streeter, Associate Solicitor) Washington D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

John Dale Powers and Michael H. Rubin (Sanders, Downing, Kean & Cazedessus), Baton Rouge, Louisiana, for the employer.

Before: SMITH, Chairman, and MILLER, Member.

SMITH, Chairman:

This is an appeal by the Director, Office of Workers'

Compensation Programs, from a Decision and Order (76-LHCA-652) of Administrative Law Judge Robert S. Amery pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereafter referred to as the Act).

Claimant is a carpenter who was 30 years old at the time of his injury. He has a tenth grade education and has done manual labor all his life. He has had jobs loading and unloading barges, as a mechanic, and on oil drilling rigs in addition to working as a carpenter. His claim for compensation was based on a back injury suffered by claimant on December 12, 1972, while he was working for his employer, Hullinghorst Industries. After the injury claimant was hospitalized for three days. He then returned to the job site, but back pain prevented him from performing any work. Employer carried him on the payroll at his regular wages until December 28, 1972, when it terminated claimant from its employ. Claimant testified that he was refused welfare assistance, but he has received some social security benefits. He also received payments totalling $6,223.00 under the Louisiana workmen's compensation act. Employer Hullinghorst made no voluntary payments of compensation under the Longshoremen's Act. Claimant has had two operations on his back — one in 1973 and one in 1974 — and also has a heart condition. Further back surgery has been recommended, but claimant is afraid to undergo another operation. He has not worked since his injury in 1972 and continues to suffer pain and exhaustion.

Claimant's job on the date of his back injury was to build a scaffold underneath the end of a pier over the Mississippi River. The purpose of the scaffold was to provide a place to stand for other workers who were to repair a "turntable" that had been torn and bent by a ship leaving the pier. The "turntable" was a cargo-handling device owned by BASF Wyandotte Corp. (Wyandotte) for use in loading and

unloading ships. The scaffold was constructed by clamping boards to the pier and building a structure of metal tubing on the boards.

Claimant was working on Wyandotte's premises in Geismar, Louisiana, at the time of his injury. Wyandotte is a chemical company. Employer Hullinghorst was under contract with Wyandotte to do maintenance, repair and renovation work at Wyandotte's facilities, including insulation maintenance.

On July 1, 1976, a formal hearing was conducted in Baton Rouge, Louisiana, before Administrative Law Judge Robert S. Amery. Wyandotte received notice of the hearing but did not appear. Claimant and Hullinghorst (which is not insured under Section 32 of the Act, 33 U.S.C. §932) stipulated (1) that all notice and filing requirements under the Act were timely made (2) that there was an employer/employee relationship between them at the date of claimant's injury; (3) that claimant's average weekly wage was $182.81; (4) that no other compensation was paid to claimant other than the $6,223.00 paid under the Louisiana Act; and (5) that a stipulation regarding incurred medical expenses would be worked out later between the parties. It was also agreed at the hearing that medical testimony would be taken by deposition.

On September 27, 1976, Judge Amery issued a Decision and Order denying compensation to claimant. The Director, Office of Workers' Compensation Programs has appealed the administrative law judge's finding that claimant is "not an 'employee' within the meaning of Section 2(3) of the Act." 33 U.S.C. § 902(3).

Section 2(3) of the Act defines the term "employee" as follows:

"any person engaged in maritime employment, including

> any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . ."

The administrative law judge found the key phrase in the definition to be "maritime employment," and stated, "in my opinion the claimant's job at the time of his injury was no more maritime in character than that of any carpenter who builds a scaffold anywhere in the country far from navigable waters." He also concluded that "[n]either the claimant nor any other employees of Hullinghorst Industries, Inc., were engaged in any way with building, repairing, loading or unloading any vessel," and that, "claimant's work as a carpenter had no realistically significant relationship to traditional maritime activity."

The judge's decision was based primarily on *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 179 (1976). In that case, the Court of Appeals for the Ninth Circuit found a "log pond" worker not an employee under the Act on the ground that his work was not "maritime employment" in the traditional sense. However, in cases presenting factual patterns more closely resembling the instant case, the Court of Appeals for the Fifth Circuit (whose case law would control this case) and the Board have construed Section 2(3) to cover injured employees.

First in the recent series of Section 2(3) cases from the Fifth Circuit was *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976). This case, which was a consolidation of five appeals, established a test for determining employee status under Section 2(3).

> "[A]n injured worker is a covered 'employee' if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work."

Id. at 539-40. The court also left open the possibility of future expansion of the concept of covered employees.

> "By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not 'directly involved' with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation."

Id. at 540, n. 18.

Using its "direct involvement" test, the Fifth Circuit found a worker whose job was to maintain and repair tools and machinery used in loading and unloading ships to be a statutory employee.

> "Although no ships were being loaded or unloaded on the day of the injury, Winchester's job of repairing and maintaining the gear used by the longshoremen was a continuous, direct involvement with maritime activities."

Texports Stevedore Co. v. Winchester, 554 F.2d 245, 247 (5th Cir. 1977).

An employee whose job was to sandblast a disassembled crane which was used in shipbuilding also was found to be covered under Section 2(3). *Alabama Dry Dock and Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir. 1977). Claimant's work passed the "direct involvement" test because repair and maintenance work on machines used in shipbuilding was found to be "an essential aspect of the business." *Id.* at 178. The court concluded that the disassembled state of the crane, the fact that it was not in operation, and the "discontinuity of time" between claimant's injury and actual shipbuilding, did

not make the work less essential to employer's shipbuilding operation. *Id.* at 178.

For several years the Board has construed Section 2(3) in favor of claimants whose work did not fit precisely within the categories of loading, unloading, repairing or building ships.

The duties of a "lockerman" who stored, maintained, and serviced longshoring equipment were found to be "an integral and essential part of the overall longshoring operations." *Herron v. Brady-Hamilton Stevedore Co.* 1 BRBS 23, 276, BRB No. 74-171 (Jan. 23, 1975). A later Board decision in the same vein involved a claimant who was a general maintenance and repair mechanic who worked on forklifts used by the employer to unload ships. In the Board's words,

> "[m]erely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and thus, such an employee's duties are included in the broad concept of maritime employment."

Bradshaw v. J. A. McCarthy, Inc., 3 BRBS 195, 198, BRB No. 75-209 (Jan. 26, 1976), *aff'd*, No. 76-1146 (3rd Cir. Sept. 19, 1977).

An engineer working on a scuba diving training program designed to train engineers to evaluate structural aspects of underwater facilities owned by employer was also found to be a covered employee. The Board held,

> "[a]lthough 'maritime employment' *includes* '. . . any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . .' it is not *limited* to persons engaged in those activities. 33 U.S.C. § 902(3)."

Sharp v. Pacific Gas & Electric Co., 2 BRBS 381, 384, BRB No. 75-170 (Oct. 30, 1975).

Comparing claimant Carroll's work building a scaffold to facilitate repair of cargo handling equipment to the jobs performed by claimants in the preceding cases, it is clear that claimant was "directly involved" in shiploading operations. The scaffold was an "essential aspect" of the business of loading and unloading ships at Wyandotte's pier. Accordingly, he is an employee under Section 2(3) of the Act.

The administrative law judge also found that claimant's employer Hullinghorst was not an "employer" under Section 2(4) of the Act. 33 U.S.C. § 902(4). However, it is clear that claimant was injured at a situs covered by the Act. 33 U.S.C. § 903(a). The Fifth Circuit in *Jacksonville Shipyards, Inc. v. Perdue, supra*, held that "if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4)." *Id.* at 538 n. 9.

Accordingly, the Board reverses the Decision and Order of the administrative law judge and remands the case for further consideration of the nature and extent of claimant's disability and for determination of compensation and other benefits due to him under the Act.

SAMUEL J. SMITH, Chairman

MILLER, Member, concurring:

I concur in the holding that the claimant is an employee within the meaning of Section 2(3) of the Act, but do not find it necessary to determine whether he was engaged in unloading a vessel since he was injured over pre-amendment "navigable waters."

The administrative law judge, following the lead of the

United States Court of Appeals for the Ninth Circuit in *Weyerhauser Company v. Gilmore, supra,* has consigned all cases dealing with jurisdiction of the Act, decided prior to the 1972 amendments to limbo. The board has recently determined that it would not follow the Ninth Circuit's decision in *Weyerhauser,* since it is neither in accord with the legislative history of the 1972 amendments nor with the expansive interpretation given Section 2(3) in *Northeast Marine Terminal Co., Inc. v. Caputo,* U.S. ___, 97 S. Ct. 2348 (1977). *Nelson v. Warren Brothers,* ___ BRBS ___, BRB No. 77-414 (Jan. 24, 1978).

The work of the claimant at the time of injury placed him over pre-amendment "navigable waters." Accordingly, claimant would be covered as an employee within the meaning of the Act even if it could be said that he was not engaged in shiploading operations.

I therefore concur in the reversal of the Decision and Order of the administrative law judge who found claimant not to be an employee within the meaning of Section 2(3) of the Act.

I Concur:

JULIUS MILLER, Member

Dated this 27th day
of January, 1978

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1532

HULLINGHORST INDUSTRIES,

Petitioner,

versus

DAVID E. CARROLL, and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of An Order of the Benefits Review Board

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

BY THE COURT:

It is ORDERED that the motion of respondent, Director, Office of Workers' Compensation Programs, United States Department of Labor, to dismiss the petition for review in the above cause is GRANTED, without prejudice to the right of appeal if and when a final order shall have been entered.

APPENDIX E

In the Matter of

DAVID E. CARROLL

Claimant

v.

HULLINGHORST INDUSTRIES, INC.

Employer

Case No. 76-LHCA-652

OWCP No. 7-34955

Janine Syll Dingleman, Esq.
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338 Lafayette Street
New Orleans, Louisiana 70130
For the Claimant

John Dale Powers, Esq. and
Michael H. Rubin, Esq.
Sanders, Downing, Kean & Cazedessus
P. O. Box 1588
Baton Rouge, Louisiana 70821
For the Employer (Respondent)

Before: ROBERT S. AMERY
Administrative Law Judge

DECISION AND ORDER ON REMAND

In a two member decision (7 BRBS 538, BRB No. 76-500) dated January 27, 1978 written by Chairman Smith and concurred in by Member Miller for a different reason, the

Benefits Review Board reversed my Decision and Order in the above captioned case, dated September 27, 1976, which had held that the claim should be dismissed for lack of jurisdictional coverage. In reversing, the Board remanded the case to me for further consideration of the nature and extent of the claimant's disability and for determination of compensation and other benefits due to him under the Act.[1]

In my original Decision and Order I set forth the facts of the case in some detail, but some additional evidence has been produced since that time and significant parts of this will be summarized herein.[2]

The deposition of Dr. Jack F. Loupe, an orthopedic surgeon, is admitted in evidence as claimant's Exhibit 5. Dr. Loupe testified he first examined the claimant on September 14, 1973. The claimant appeared to have pain with movement of his back and he complained of low back pain and pain in the legs, especially the left. Upon examination of the

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[1] Following this, the respondent appealed the Board's decision to the Fifth Circuit Court of Appeals, but on April 24, 1978 the appeal (No. 78-1532) was dismissed "without prejudice to the right of appeal if and when a final order shall have been entered."

[2] The following are hereby admitted in evidence:

(1) A letter from me to the counsel dated February 23, 1978 will be ALJ Exhibit 5.

(2) A letter from John Dale Powers, Esq. to me dated February 27, 1978 will be ALJ Exhibit 6.

(3) A letter from Janine Syll Dingleman, Esq. to me dated March 10, 1978 will be ALJ Exhibit 7.

(4) A letter from William Henry Sanders, Esq. to me dated March 13, 1978 will be ALJ Exhibit 8.

(5) A letter from John Dale Powers, Esq. to me dated March 14, 1978 will be ALJ Exhibit 9.

(6) A letter from John Dale Powers, Esq. to me dated March 20, 1978 will be ALJ Exhibit 10.

(7) A letter from William Henry Sanders, Esq. to me dated March 29, 1978 constituting his application for attorney's fees will be ALJ Exhibit 11.

(8) A letter from Michael H. Rubin, Esq. to me dated April 19, 1978 with memorandum enclosed in opposition to the application for attorney's fees will be ALJ Exhibit 12.

(9) A letter from William Henry Sanders, Esq. to me dated April 25, 1978 in surrebuttal will be ALJ Exhibit 13.

(10) A letter from Janine Syll Dingleman, Esq. to me dated May 1, 1978 will be ALJ Exhibit 14.

lumbar and lumbosacral spine Dr. Loupe noted paravertebral spasm bilaterally was sustained with moderate restrictions of motion and mechanical disturbance of function of the lumbosacral spine, particularly with extension. There was no list, but the lumbar curve was flattened and did not reverse normally upon forward flexion. There was tenderness to palpation in the L-4 to L-5 interspace. The straight leg raising test was positive on the left at about 60 degrees and this was accentuated by passive dorsiflexion of the foot. The same test was mildly positive on the right. There was some weakness of his left foot and toe extensor muscles, as well as of his peroneals and posterior tibials, which cause movement from side to side in the foot. There was no sensory deficit. The left ankle jerk was reduced as compared to the right one. The knee jerks responded equally with an inconsistent diminution of the left knee jerk reflex. X-rays were essentially negative, but there was questionable narrowing of the L-5 S-1 intervertebral disc. Dr. Loupe's impression was that the claimant had substantial objective and subjective findings consistent with a lower back problem and probably with intervertebral disc herniation. The doctor thought that the claimant had gone as far as he could with conservative treatment with no improvement and that a repeat lumbar myelogram and surgery should be considered.

On September 27, 1973 the claimant returned complaining of severe low back pain and severe increased pain in both legs, especially the left. The claimant was stooped forward, couldn't straighten up, and listing to the right. Dr. Loupe found a 4+ muscle spasm, which was the maximum. There was severe complete restriction of motion in the lumbosacral spine, straight leg raising was exquisitely positive on the left and the left ankle jerk was diminished as previously. The claimant was admitted to the hospital that day, put in traction again and given physical therapy, but this only increased his pain. On October 1, 1973 the lumbar myelogram was done and it showed a herniated disc between L-4 and

L-5. Dr. Hewitt a cardiologist, was brought in for consultation because of the claimant's family history of a high prevalence of heart disease. The claimant was treated by Dr. Hewitt and temporarily released.

On October 23, 1973 the claimant was readmitted and on October 24, 1973 Dr. Loupe performed a standard type of laminectomy with removal of a herniated disc at L-4/5 on the left. Fusion was not performed because of the increased risk due to the claimant's coronary artery disease. Except for some mild right leg pain the claimant did well postoperatively and Dr. Loupe saw him periodically thereafter.

By December 1973 the claimant reported recurrence of his low back and left leg pain following a fall he had when he stumbled and fell at home. Upon examination he was noted to be limping, paravertebral muscle tightness was present and a possible spasm. There were moderate restrictions of motion, also. His condition continued to worsen and on January 14, 1974 he was admitted to the hospital for 3 days for conservative treatment consisting of traction and muscle relaxants. He responded well. X-rays showed a narrowing at the L-4/-5 level of a moderate degree which may have been accelerated by the claimant's fall and his traveling in a car to see his sick brother.

On March 18, 1974 the claimant had increasing pain in his left lower back with some radiation into the upper left thigh. He had severe muscle spasm, severe restrictions of motion and painful left straight leg raising. X-rays taken then showed further narrowing of the L-4/-5 intervertebral disc space and the L-4/-5 vertebral body had displaced posteriorly somewhat because of the narrowing. He was admitted to the hospital for 6 days for rest, physical therapy and traction. His condition did not improve much and he continued to have unrelenting spasm and listing of the trunk.

On April 17, 1974 he had a repeat lumbar myelogram which showed a large defect on the left at L-4/-5 and a normal L-3/-4 discogram. Dr. Loupe operated on the claimant again on April 19, 1974 and found a recurrent herniated disc at L-4/-5 on the left with moderate fibrosis or scar tissue. The L-5/S-1 disc was seen to be narrow but not otherwise abnormal. The claimant did well and was discharged on April 27, 1974.

In the following months the claimant had some pain in his left leg and left lower back with some muscle spasm, listing and restricted movement. He was hospitalized again in July 1974 with chest pain and treated by Dr. Hewitt. In September 1974 he was again hospitalized after being run off the road by another car several times which caused aggravation of his back pain. Dr. Loupe recommended the claimant's continued use of his chair back brace and limited activity. He was worse again with continued low back pain in January 1975 and Dr. Loupe advised him to continue the exercises he had prescribed previously, except for those that were painful. By January 1976 Dr. Loupe thought the claimant was doing satisfactorily, but that he was disabled from significant physical activity, such as holding down a job for 8 hours whether it was sitting or standing, and he could not do any lifting or bending of significance.

On May 10, 1976 the claimant again had severe incapacitating pain in the lumbar area with pain going into both legs. There were severe spasm and restrictions of motion. He also had problems in October 1976. Another myelogram was performed on January 12, 1977 which showed a large defect again at L-4/-5 on the left. He underwent surgery that day with removal of a recurrent disc and some fibrous tissue at L-4/-5 and a negative exploration of the L-3/-4 disc. He was discharged January 19, 1977 having been relieved of his pain and doing well. In March 1977 he still had some lower back pain and restrictions of motion, but seemed

to be doing well until May 30, 1977 when he had low back pain radiating across into the flank and he had difficulty stooping and bending. Dr. Loupe found recurrent objective findings. The claimant was again hospitalized in October 1977 for conservative treatment. He had more pain in the upper lumbar region going into the medial aspect of both thighs in February 1978. In May 1978 he had increased constant pain in the lower back and left leg which was aggravated by bending or stooping. Dr. Loupe did a lumbar puncture and injected some steroid suspension into the spinal canal hoping this would relieve some of the pain.

Dr. Loupe felt that, assuming the claimant's history was accurate, this entire sequence of back problems was caused initially by his accident of December 1972. The doctor thought the claimant was disabled, that he could not tolerate either sitting or standing for more than an hour without pain and certainly not stooping or bending. The doctor thought the claimant had extensive disc disease and probably weak discs. He might possibly improve over 2 or 3 more years, but he also might have problems with his third lumbar disc. Dr. Loupe thought the claimant's functional impairment was 20% to the body because he had to modify his activities due to persistent pain and he had one disc removed completely on 3 occasions. However, the doctor could not think of any kind of employment that the claimant was capable of doing, since he was still suffering considerably from low back pain on prolonged sitting or standing. Dr. Loupe said he never found the claimant to be misleading him in anything and he felt the claimant really had the pain.

Upon cross-examination, Dr. Loupe admitted that from his initial examination of the claimant in September 1973, except for what the claimant told him, he couldn't tell when the initial injury occurred or even whether any injury had occurred at all. Dr. Loupe also agreed that the claimant's falls, his auto accident and his occasional failure to follow

Dr. Loupe's instructions could have aggravated his condition. The doctor thought that if the claimant's description of the incident in which he was lifting something and felt a pulling sensation in his back was true and the symptoms persisted over the following 9 months, that that would be the cause of his condition, rather than it happening spontaneously or due to his genetic condition.

The deposition of Dr. Ira L. Hewitt, a specialist in internal medicine, is admitted in evidence as Claimant's Exhibit 6. Dr. Hewitt first saw the claimant on September 22, 1973 when Dr. Loupe consulted him about the claimant's cardiac status at the Lady of the Lake Hospital. Dr. Hewitt found the claimant had a mesomorph (short, stocky, muscular) body build, he was having substernal (chest) pain which was provoked by exertion and excitement and relieved by rest. He gave a positive family history of coronary heart disease. His electrocardiogram was slightly distorted, so it was not clearcut unequivocal proof of early diaphragmatic wall ischemia. Dr. Hewitt decided at that time that the claimant was probably having early angina pectoris in the first evolutionary stage. Dr. Hewitt treated the claimant with Peritrate, an arterial dilator, nitroglycerin for substernal pain, and a sedative. On October 25, 1973 Dr. Hewitt again saw the claimant in the hospital in consultation with Dr. Loupe, prior to his disc surgery. The claimant withstood the operation well and had no postoperative complications from a cardiovascular standpoint.

After that Dr. Hewitt saw the claimant about every 6-8 weeks for his heart disorder. His diagnosis of the claimant's problem remained unchanged. He last saw the claimant on April 11, 1978 when the claimant still gave a history of periodic substernal pain relieved by nitroglycerin, in spite of a fairly normal appearing EKG. The doctor still felt that the claimant had early evolutionary phase of coronary heart disease. He had had no episodes of chest pain prior to the time

he first saw Dr. Hewitt, but since then he continued to suffer periodic instances of chest pains which were kept under control with medication the doctor prescribed.

According to what the claimant told him of his accident, that he never had chest pain before that, but he did begin having substernal pain after it, Dr. Hewitt felt that there was some cause and effect relationship of the trauma to precipitating his heart disorder. Dr. Hewitt thought, assuming the claimant injured his back in December 1972 and this continued to bother him, that this injury and the resulting concern over its failure to resolve itself could have been a factor precipitating or accelerating his chest pain and this early stage coronary disease. Dr. Hewitt thought that the claimant's heart condition had improved recently, however, that he would continue to be disabled for moderate or strenuous activity permanently, but not for mild sedentary activity. He thought the claimant's condition would probably not improve, but it might worsen. He agreed on cross-examination that the claimant's heart condition could have occurred without any underlying trauma and that it could have occurred spontaneously.

The deposition of Dr. William L. Fisher, Jr. a neurological surgeon, is admitted in evidence as Respondent's Exhibit 9. Dr. Fisher saw the claimant on January 9, 1973 in consultation with Dr. Stephen Wilson at the Lady of the Lake Hospital. He had a normal examination from a neurological or neuromuscular standpoint. A myelogram was done on January 11, 1973, since the claimant had been complaining of back pain and pain in his right leg. The myelogram was normal in all respects, so Dr. Fisher did not feel the claimant had any further need for neurosurgical treatment. He never saw the claimant again. On cross-examination Dr. Fisher admitted that about 15% of the time a myelogram will be falsely normal. He said it would be possible, but not probable, that an initial myelogram would appear normal, but months later an insignificant disc herniation that did not appear on the first

myelogram might worsen and develop into a significant herniation appearing on a subsequent myelogram. He agreed that certain positions of herniations are not seen on a myelogram. He said that it was possible to injure an L-4/-5 intervertebral disc through a fall or an auto accident.

The deposition of Dr. Stephen M. Wilson, an orthopedic surgeon, is admitted in evidence as Respondent's Exhibit 10. Dr. Wilson first saw the claimant on December 22, 1972. Examination revealed some tenderness to palpation in the lower back area. The claimant said he was unable to bend forward or to heel and toe walk without severe pain. Straight leg raises were positive in the sitting position with pain at 30 degrees on the right side. The doctor's impression was low back syndrome, so the claimant was admitted to the hospital for traction and a myelogram. A neurosurgeon (Dr. Fisher) did the myelogram, saw no defect and recommended no surgery, so the claimant was discharged from the hospital.

On January 15, 1973 Dr. Wilson again saw the claimant who said he was still having severe backache and some headache. Examination of his lower back revealed no positive or objective findings and Dr. Wilson did not see him again after that. Dr. Wilson agreed there was a percentage of error when a myelogram might read normal, yet would not in fact be normal. He also agreed that it was possible to herniate or rupture a disc in an auto accident, through a fall or even a cough.

A letter from Janine Syll Dingleman, Esq. to me dated March 8, 1979 enclosing a stipulation of the parties as to the claimant's medical expenses is admitted in evidence as ALJ Exhibit 17.[3] This shows that the claimant had incurred some

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[3] A letter from Michael H. Rubin, Esq. to me dated August 30, 1978 enclosing the second set of interrogatories to the claimant will be admitted as ALJ Exhibit 15. I never received a copy of the first set of interrogatories and it may be that those were never answered.

A letter from Janine Syll Dingleman, Esq. to me dated October 30, 1978 containing answers to the second set of interrogatories is admitted as ALJ Exhibit 16.

$13,245.40 in medical expenses of which about $8,324.94 had been paid through medicare.

In resolving the issue of causal relationship between the claimant's condition and his employment I am mindful of the principles that the Act should be construed liberally in favor of the employees and that it is in their favor that doubts, including the factual, are to be resolved. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir. 1976) cert. den. 429 U.S. 820 (1976); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955) cert. den. 350 U.S. 836 (1955); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969) cert. den. 395 U.S. 921 (1969).

Upon considering all the evidence in the case I find that the claimant suffered an injury to his back on December 12, 1972 while building a scaffold on a pier over the waters of the Mississippi River near Geismar,[4] Louisiana. I find, also, that the injury arose out of and occurred in the course of his employment for the respondent. I found the claimant's testimony as to how the injury occurred to be honest, sincere and credible and this was corroborated to some extent by the testimony of Drs. Loupe and Hewitt, the treating physicians, to the effect that in their opinions the claimant's back and heart problems probably were caused, aggravated or accelerated by his injury of December 12, 1972.

In considering the degree of the claimant's disability I have considered the claimant's age, education, industrial history and the availability of that type of work which he can do. *American Mutual Insurance Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970); *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649 (5th Cir. 1963). I note that the claimant is now 37 years old, he has a tenth grade education and his prior employment has involved hard physical labor as a carpenter, working on oil rigs and on a grain elevator. Drs. Loupe and Hewitt

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[4] Apparently Geismar is the correct spelling, not Gozma, as it appeared in the transcript and my original Decision and Order.

have testified to the effect that he is permanently disabled from doing any strenuous or moderate physical activity. In fact, Dr. Loupe even stated that he thought the claimant could not do any kind of a job that involved prolonged sitting or standing, the claimant could not do any work involving bending, stooping or lifting, and the doctor could think of nothing the claimant was capable of doing. The claimant, himself, said he gets exhausted easily and he could not even mow his lawn. He said sometimes his chest gets tight, he can hardly breathe and he gets chest pains like a burning sensation in the middle, then little sharp needle like pains start shooting into his left arm. He cannot lift more than 20 or 30 lbs. and he cannot stand for prolonged periods without his left leg going to sleep and his back aching. Furthermore, the respondent has not presented any evidence showing that actual and suitable work opportunities were available to the claimant. *American Stevedores v. Salzano*, 538 F.2d 933 (2d Cir. 1976).

Under these circumstances I find that the claimant has been permanently totally disabled since December 28, 1972, when he stopped working. To be considered permanent, a disability need not be "eternal or everlasting," it is sufficient that the "condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedoring Corp., supra* at 654. Should the claimant's condition hereafter improve the respondent can apply under Section 22 of the Act for an appropriate modification of the award.

The claimant is entitled to reimbursement or payment by the respondent of the reasonable costs of such necessary medical care and treatment as his injury of December 12, 1972 has required or may require. Section 7(a) of the Act. This includes all outstanding medical expenses for both his back injury and heart condition as set forth in ALJ Exhibit 17 and

all future medical expenses reasonably related to the December 12, 1972 injury.

Interest at the rate of 6% per annum shall be added to the amount of compensation found due herein, calculated from the date each payment was due until it is paid to the claimant. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971) cert. den. 406 U.S. 958 (1972).

William Henry Sanders, Esq., the claimant's counsel at the hearing and prior thereto, has submitted an application for attorney's fees for 119.5 hours work at $100. an hour. This has been vigorously opposed by counsel for the respondent, both as to the number of hours spent on the case and the rate per hour. In 1976 and prior thereto the regulation concerning attorney's fees, 20 CFR 702.132, provided in part:

> "The application shall be supported by a complete statement of the extent and character of the necessary work done. . . . Any fee approved shall be reasonably commensurate with the actual necessary work performed. . . ."

I am, therefore, required by regulation and Section 28(a) of the Act, to approve only a *reasonable* attorney's fee, *a fee reasonably commensurate with the actual necessary work done*. Thus, I believe that if the claimant's counsel spent more time on an item than should be reasonable and necessary under the circumstances I should not approve a fee for the excess time for any unnecessary work.

I agree with the respondent's counsel that excessive time was taken on many of the items listed in Mr. Sanders' application. Concerning items 1 and 2 in interviewing the claimant, 12 hours seems excessive, 6 hours should have been adequate. As for items 3, 4, 8, 9, 11, and 12, constituting 45 hours for correspondence, I feel that both the length of time per letter and the number of letters written seemed more than necessary

and that 15 hours should have sufficed in this case. Concerning items 5 and 13 on research, I believe that no more than 5 hours should have been required, not 20.5. In item 6, the counsel should have been able to read, review and evaluate the few medical reports in 2 hours, not 10. In item 15, as I recall, the formal hearing only lasted about 3 hours and the preparation for it should have required no more than 3 more, rather than the 12 hours requested. As far as interviewing witnesses in their homes is concerned, the only necessary witness presented on behalf of the claimant at the hearing was the claimant himself, and that has already been covered under items 1 and 2. I also agree with the respondent's counsel that the rate per hour requested is excessive and that $60. per hour is a more reasonable rate in that area for the quality of the legal services performed for the claimant. Accordingly, I approve an attorney's fee for 44 hours at $60. per hour amounting to $2640. for all legal services performed by Mr. Sanders to the time of the formal hearing and the post hearing briefs except for his time before the Deputy Commissioner.

There remains item 7 in the application, involving 8 hours spent in a conference with the Deputy Commissioner. Since there may be a factual question as to whether the conference actually lasted that long this item should be dealt with by an evidentiary hearing or a fee request could be submitted directly to the Deputy Commissioner for work performed at that level. In order to save the time and expense of an evidentiary hearing on so insignificant a matter, I direct that an application be submitted directly to the Deputy Commissioner covering only the time spent at the informal conference as mentioned in item 7 of the application. All other items will be dealt with herein as not being *bona fide* factual questions. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, BRB No. 78-237 (1978) rev'd on other grounds *sub nom Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP and Watkins*, ___F.2d ___, No. 78-1525 (4th Cir. March 26, 1979), 9 BRBS 1089. The respondent's

counsel's request for an evidentiary hearing on attorney's fees is denied.

In addition, since the case has been remanded to me from the Benefits Review Board, Janine Syll Dingleman, Esq. has been representing the claimant. She has not submitted an application for her legal fees in the case, so no award is made to her at this time. Cf. *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1955). Leave is hereby granted to Ms. Dingleman to file an application in accordance with 20 CFR 702.132 (with service of a copy upon the respondent's counsel) within 10 days after her receipt of this Decision and Order on Remand. An application received after that time will be rejected as not having been timely filed. The respondent's counsel shall have 10 days after receipt of their copy of the application to file a reply thereto if they wish to do so.

ORDER

1. The respondent shall pay to the claimant compensation for permanent total disability under provisions of Section 8 (a) of the Act, 33 USC 908(a) commencing December 29, 1972 until further ordered, at the rate of $121.87 per week, plus all statutory adjustments.

2. The respondent shall pay interest on accrued unpaid benefits at the rate of 6% per annum computed from the date each payment was originally due until paid.

3. The respondent is to be credited with all amounts of compensation it has already paid the claimant for his injury of December 12, 1972.

4. In accordance with Section 7(a) of the Act, 33 USC 907(a), the respondent shall pay for the reasonable costs of necessary medical care and treatment resulting from the claimant's injury of December 12, 1972.

5. The respondent shall also pay directly to William Henry Sanders, Esq. the sum of $2640. which is for all his legal services and his costs incurred on behalf of the claimant in connection with this case, except for his services at an informal conference at the Deputy Commissioner level.

ROBERT S. AMERY
Administrative Law Judge

Dated: August 20, 1979
Washington, D.C.

CERTIFICATE OF FILING AND SERVICE

I certify that on August 27, 1979 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

David E. Carroll, 2326 N. Magnolia St., Baker, LA 70714

Claimant

Kullinghorst Industries, Inc., Rte. 5, 12360 Leisure Rd., Baton Rouge, LA 70807

Employer

General Accident Group, 3301 N. Causeway Blvd., Metairie, LA 70002

Insurance Carrier

Janine S. Dingleman, Esq., Martzell, Montero & Lamothe, 338 Lafayette St., New Orleans, LA 70130

John D. Powers, Esq., Sanders, Downing, Kean & Cazedessus, P. O. Box 1588, Baton Rouge, LA 70821

A copy was also mailed by regular mail to the following:

Judge Robert S. Amery, Office of the Administrative Law Judges, U. S. Department of Labor, Room 909, F. Edward Hebert Federal Building, 600 South Street, New Orleans, Louisiana 70130

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA), U. S. Department of Labor, Room S3524, 200 Constitution Avenue, N.W., Washington, D.C. 20211

GLENN H. WOODLEY
Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3142

HULLINGHORST INDUSTRIES, INC.,

Petitioner,

versus

DAVID E. CARROLL,

Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Stay Pending Review

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for stay of the Administrative Law Judge's order of August 27, 1979 is DENIED.

APPENDIX G

BENEFITS REVIEW BOARD
U. S. DEPARTMENT OF LABOR
WASHINGTON, D.C. 20036

DAVID E. CARROLL

Claimant-Respondent

v.

HULLINGHORST INDUSTRIES, INC.

and/or

BASF WYANDOTTE CORPORATION

Employer/Carrier-Petitioners

BRB No. 79-558

ORDER

Petitioners have requested that the Board issue an Order staying payment of claimant's attorney's fee.

Section 21(b)(3) of the Act provides that "the payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board." 33 U.S.C. §921(b)(3). However, this provision does not relate to an award of an attorney's fee.

The Act provides two methods for enforcement of a compensation order. Under Section 18 of the Act, 33 U.S.C. §918, a claimant can obtain enforcement upon a "default by the employer in the payment of compensation due under any award of compensation . . ." provided certain criteria are met. Accordingly, absent a stay of payments, compensation would

be due. However, compensation would not include a fee awarded to claimant's attorney. 33 U.S.C. §§902(2), 928. Section 21(d) of the Act, 33 U.S.C. §921(d), provides for enforcement where employer "fails to comply with a compensation order making an award, that has become final. . . . " An attorney's fee would therefore be enforceable as part of the compensation order. However, no enforcement proceedings would be effective if the order was not final. *See also* 33 U.S.C. §928(a). In that the administrative law judge's Decision and Order has been appealed, it is not yet final. 33 U.S.C. §921 (a). Therefore, the award of an attorney's fee is not enforceable and no stay is necessary. Accordingly, the motion of the employer and carrier is denied. 33 U.S.C. §921 (b)(3).

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

JULIUS MILLER
Administrative Appeals Judge

ISMENE M. KALARIS
Administrative Appeals Judge

Dated this 6th day
of December 1979.

SERVICE SHEET

BRB No. 79-558: DAVID E. CARROLL v. HULLINGHORST INDUSTRIES, INC. and/or BASF WYANDOTTE CORPORATION (Case No. 76-LHCA-652) (OWCP No. 7-34955)

Copies were sent to the following:

John Dale Powers, Esq. —Certified—
Michael H. Rubin, Esq.

Sanders, Downing, Kean
& Cazedessus
P. O. Box 1588
Baton Rouge, LA 70821

William Henry Sanders, Esq. —Certified—
P. O. Drawer P
Jena, LA 71342

Janine Syll Dingleman, Esq. —Certified—
Martzell, Montero & Lamothe
338 Lafayette Street
New Orleans, LA 70130

Miss Laurie M. Streeter
Associate Solicitor
U. S. Department of Labor
Suite N-2716, NDOL
Washington, DC 20210

Mr. Glenn H. Woodley
Assistant Deputy Commissioner
US DOL/ESA/OWCP
P. O. Box 30628
New Orleans, LA 70190

APPENDIX H

UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS
SEVENTH COMPENSATION DISTRICT

In the matter of a claim for
compensation under the Longshoremen's
and Harbor Workers' Compensation Act —

DAVID E. CARROLL

Claimant

vs.

HULLINGHORST INDUSTRIES

Employer

THE GNERAL ACCIDENT GROUP

Insurance Company

SUPPLEMENTAL ORDER
DECLARING AMOUNT OF DEFAULT

CASE No. 76-LHCA-652
OWCP No. 7-34955
BRB No. 79-558, 76-500

FINDINGS OF FACT

1. That on October 19, 1976, a Decision and Order of Administrative Law Judge Robert S. Avery, was filed in the

Office of the Deputy Commissioner of the Seventh Compensation District;

2. That said Decision and Order denied benefits to David E. Carroll, the claimant herein;

3. That said Decision and Order is incorporated herein, in its entirety, by reference;

4. That said Decision and Order was appealed to the Benefits Review Board and made part of their record on December 16, 1976; that said appeal bears BRB No. 76-500; that on January 27, 1978 the Decision and Order of Judge Robert S. Amery was reversed and remanded by the Benefits Review Board; that on March 13, 1978 a Petition For Review was filed with the Fifth Circuit Court of Appeals; that said appeal was dismissed by the court on April 24, 1978, without prejudice; that by Order of the Board dated May 24, 1978 the case was remanded to Judge Robert S. Amery for action in accordance with the Decision and Order of the Board dated January 27, 1978; that on August 27, 1978 the Decision and Order on Remand of Judge Robert S. Amery was filed in the Office of the Deputy Commissioner; that the aforementioned are incorporated herein, in their entirety, by reference;

5. That on October 11, 1979 the Benefits Review Board noted the employer's/petitioners Notice of Appeal and denied their Motion To Stay Payments; that Judge Robert S. Amery's Supplemental Order was filed in the Office of the Deputy Commissioner on October 22, 1979 awarding attorney fees to Janine S. Dingleman, Esq., in the amount of $2,304.60; that the Benefits Review Board filed an Order dated December 6, 1979 denying the employer's/petitioners Motion To Stay Payment of Attorney's fees; that the aforementioned documents are incorporated by reference in their entirety;

6. That payment of compensation under the terms of the

Decision and Order has not been made as required by 33 U.S.C. 914(f);

7. That timely application has been made by the claimant under 33 U.S.C. 918(a) for a supplementary compensation order declaring the amount of default;

8. That there exists no factual dispute beween the parties regarding the payment of compensation.

That based on the foregoing findings of fact the Deputy Commissioner makes the following:

ORDER

The total amount of compensation due and payable pursuant to the Decision and Order of the Administrative Law Judge is hereby declared to be in default.

The provisions of 33 U.S.C. 914(f) shall attach to all unpaid installments of compensation until paid.

Six percent interest shall be attached to all unpaid installments or compensation until paid.

Given under my hand this 25th day of January 1980, at New Orleans, Louisiana.

GLENN H. WOODLEY
Deputy Commissioner
Seventh Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Supplementary Compensation Order has been sent by certified mail to the

following parties, at the last known address of each, as follows:

Mr. David E. Carroll, 2326 N. Magnolia St., Baker, LA 70714

Claimant

Hullinghorst Industries, Rt. 5, 12360 Leisure Rd., Baton Rouge, LA 70807

Employer

General Accident Group, 3301 N. Causeway Blvd., Metairie, LA 70002

Insurance Company

Ms. Janine S. Dingleman, 338 Lafayette St., New Orleans, LA 70130

Attorney for Claimant

Mr. John D. Powers, P. O. Box 1588, Baton Rouge, LA 70821

Attorney for Employer

A copy was also mailed by regular mail to the following:

Judge Robert S. Avery, Office of Administrative Law Judges, U. S. Department of Labor, Room 909, F. Edward Hebert Federal Building, 600 South Street, New Orleans, Louisiana 70130

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, LHWCA, U. S. Department of Labor, Washington, D.C. 20211

Clerk of the Benefits Review Board, U. S. Department of Labor, Room 727, Vanguard Building, 1111 20th Street, N.W., Washington, D. C. 20210

GLENN H. WOODLEY
DEPUTY COMMISSIONER
SEVENTH COMPENSATION DISTRICT

A copy was also mailed by certified mail to the following:

William H. Sanders, Esq., P. O. Drawer P, Jena, LA 71342
Attorney for Claimant

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3116

HULLINGHORST INDUSTRIES, INC.,

Petitioner,

versus

DAVID E. CARROLL and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U. S. DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of An Order of the
Benefits Review Board

Before GEE, POLITZ and RANDALL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petitioner's motion for stay pending disposition of petition for review is DENIED.

APPENDIX J

BENEFITS REVIEW BOARD
U. S. DEPARTMENT OF LABOR

No. 79-558

DAVID E. CARROLL

Claimant-Respondent

v.

HULLINGHORST INDUSTRIES, INC.

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DECISION and ORDER

Appeal from the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

Janine Syll Dingleman (Martzell, Montero and Lamothe), New Orleans, Louisiana, for the claimant.

John Dale Powers and Michael H. Rubin (Sanders, Downing, Kean and Cazedessus), Baton Rouge, Louisiana, for the employer.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by Hullinghorst Industries, Inc., (hereinafter, employer) from a Decision and Order on Remand (76-LHCA-652) of Administrative Law Judge Robert S. Amery pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

The facts of this case were discussed in the first decision of the Board in this case, *Carroll v. Hullinghorst Industries, Inc.*, 7 BRBS 538, BRB No. 76-500 (1978), and thus need not be repeated. In that decision the Board reversed the administrative law judge's holding that claimant was not a maritime employee under Section 2(3) of the Act. 33 U.S.C. § 902(3). The Board held that claimant, a carpenter involved in building a scaffolding upon which workmen would stand in repairing a "turntable" used in handling cargo, was directly involved in shiploading operations.

On remand, the administrative law judge found that claimant sustained an injury to his back on December 12, 1972, which arose out of and in the course of his employment. The judge concluded that claimant's subsequent back and heart problems were the result of this injury. He awarded claimant permanent total disability benefits beginning December 28, 1972, and continuing, as well as payment of medical expenses related to his back and heart condition and interest at six percent on all unpaid installments of compensation. The admin-

istrative law judge also awarded an attorney's fee to claimant's first attorney, reducing the requested fee for 119.5 hours at $100.00 per hour to 44 hours at $60.00 per hour.

In this appeal, employer contends that claimant is not covered by the Act and that the administrative law judge erred in finding a causal relationship between claimant's injury and his resulting disability.

Upon its review of this case, the Board may set aside the decision of the administrative law judge only if his findings are not supported by substantial evidence in the record considered as a whole, are irrational or are not in accordance with the law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith Associates*, 380 U.S. 359 (1965). Moreover, the administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Employer's argument that claimant was not covered by the Act was rejected by the Board in its first decision, *Carroll v. Hullinghorst Industries, Inc.*, *supra*, which we conclude constitutes the law of the case and thus governs our determination herein. *See McNeil v. Prolerized New England Co.*, 11 BRBS 576, BRB No. 78-578 (1979); *United States v. United States Smelting, Refining and Mining Co.*, 339 U.S. 186 (1950), *reh. denied*, 339 U.S. 972 (1950). Accordingly, we adhere to the Board's prior determination that claimant is covered by the Act.

We turn then to employer's contention that claimant's disability was not caused by his employment injury. Claimant testified that he injured his back on December 12, 1972, when he felt something "pop" in his back when handing up the last board in the scaffolding he was building. Hearing Transcript at 23. Claimant was subsequently examined and treated by Dr. Stephen M. Wilson, an orthopedic surgeon, and Dr. Wil-

liam L. Fisher, Jr., a neurosurgeon. Dr. Fisher performed a myelogram on claimant on January 11, 1973, which he read as normal in all respects. In depositions admitted into evidence, both doctors stated that their examinations of claimant had revealed no positive objective findings. Wilson Deposition at 5; Fisher Deposition at 7. In September 1973, claimant went to Dr. Loupe who also performed a myelogram and diagnosed claimant as having suffered a herniated disc. Dr. Loupe performed surgery on claimant in October 1973. Claimant has had two subsequent operations for the same problem. Dr. Loupe stated by deposition that, assuming claimant's history was accurate, in his opinion the entire sequence of back problems suffered by claimant was caused by the December 12 accident at work. Loupe Deposition at 59. Dr. Ira L. Hewitt, a specialist in internal medicine who began treating claimant for a heart disorder on September 22, 1973, when he was consulted by Dr. Loupe,[1] was also deposed. He stated that although claimant had a family history of heart trouble, in his opinion, the incident at work precipitated claimant's current heart problems, based on the fact that claimant gave no history of chest pain prior to his accident. Hewitt Deposition at 23, 25.

After a thorough review of the medical reports and deposition testimony of the above witnesses, the administrative law judge stated that he found claimant's testimony honest, sincere and credible. He also credited the testimony of Drs. Loupe and Hewitt that claimant's medical problems were the result of his accident at work. We cannot say that the administrative law judge erred in accepting the testimony of Drs. Loupe and Hewitt over that of Drs. Wilson and Fisher. The mere fact that claimant waited until September to see Dr. Loupe is not

[1] Employer challenges Dr. Hewitt's testimony on the basis that the administrative law judge accepted him as an expert in cardiology and asserts that he lacks the qualifications of an expert in that area of medicine. Dr. Hewitt was the physician treating claimant for his heart problems. In view of his detailed knowledge of claimant's heart disorder as well as his testimony concerning his general qualifications, it was not error for the administrative law judge to rely on his testimony.

sufficient reason in and of itself for finding that the administrative law judge erred in placing greater weight on his testimony than on that of Drs. Fisher and Wilson.[2] Therefore, the administrative law judge's finding that claimant's disability resulted from his accident at work on December 12, 1972, is affirmed.

In addition, employer contends that claimant is barred from seeking his remedy under the Act based on the theory that claimant has made a binding election of remedies by seeking and receiving relief under the Louisiana Workmens' Compensation Act. There is no evidence that claimant actually sought benefits. The record contains only a stipulation that he received benefits under the Louisiana Act. Hearing Transcript at 8. It is well settled that mere acceptance of payments under a state act does not constitute an election of remedies barring subsequent suit under the Act. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196 (1962); *Holland v. Harrison Brothers Dry Dock and Repair Yard, Inc.*, 306 F.2d. 369 (5th Cir. 1962). Employer must, of course, be given credit for the sums paid under the state act in order to avoid a double recovery. *Calbeck, supra.* This credit was awarded by the administrative law judge.

Employer further contends that the administrative law judge's failure to hold an evidentiary hearing on the fee awarded to claimant's first attorney constitutes a violation of

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[2] Employer alleges that claimant was involved in "two serious accidents" during the time period between his visits to the first set of doctors in January and his subsequent visits to Drs. Loupe and Hewitt in September 1973. There is no evidence that claimant suffered any injury during this time period. As the administrative law judge noted, Carroll was apparently in a car accident on September 11, 1974, which aggravated his back pain, and he "stumbled and fell" about three weeks before December 18, 1973. Loupe Deposition at 29, 44. Both of these events thus occurred well after the surgery to correct the herniated disc from which claimant's disability arose.

Furthermore, claimant testified that during this period he saw a Dr. Levert, who read Dr. Fisher's myelogram as positive and scheduled surgery. However, claimant stated that Dr. Levert refused to treat him when he found that claimant had contacted an attorney. Hearing Transcript at 30-31.

due process as well as a violation of Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (hereinafter referred to as the APA).[3] Failure to hold a formal hearing on attorney fees is not a violation of due process when the fee request is to the judicial or administrative body before whom the work was performed. *Jacksonville Shipyards v. Perdue*, 539 F.2d. 533, 4 BRBS 482 (5th Cir. 1976); *Luker v. Ingalls Shipbuilding*, 3 BRBS 221, BRB Nos. 75-243/A (1976).[4] Due process requires only that the fee request be served on employer and that employer have a reasonable time to respond. *Todd Shipyards v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1177, 5 BRBS 23 (9th Cir. 1977). In the instant case, employer did, in fact, respond to the attorney fee request. Employer's objections were carefully considered by the administrative law judge and claimant's requested fee was reduced in response to these objections. Therefore, due process was satisfied.

We also reject employer's argument that the APA requires a hearing on attorney's fees. Section 19(d) of the Act, 33 U.S.C. § 919(d), provides that hearings held by administrative law judges shall be conducted in accordance with Section 554 of the United States Code, the APA. However, Section 554 applies only where adjudication based on the record after an agency hearing is required by statute. 5 U.S.C. §

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[3] This fee represented work done by attorney William H. Sanders at the first hearing before the administrative law judge. Claimant was represented by a different attorney, Janine S. Dingleman, at the hearing on remand. The record does not reflect what fee, if any, was awarded Ms. Dingleman. Employer's allegation of error concerns only the fee awarded to Mr. Sanders for the work done in the first hearing before the administrative law judge.

[4] The Board has held in cases involving fees for work before the deputy commissioner that an evidentiary hearing is necessary only where employer raises a bona fide factual issue in challenging the fee. A bald challenge to an item in a fee application is insufficient. *See Monahan v. Portland Stevedoring Co.*, 8 BRBS 653, BRB No. 78-232 (1978); *McCloud v. George Hyman Construction Co.*, 11 BRBS 194, BRB No. 78-606 (1979). In the instant case, employer challenges the administrative law judge's award of a fee for work done before the administrative law judge. However, employer does not allege a factual issue is involved nor does he challenge the reasonableness of the fee awarded. Rather, employer challenges only the procedure followed.

554(a). Subsections 554(c) and (d), relied upon by employer herein, do not state when a formal hearing is required. Rather, these subsections establish only the procedures to be followed when formal hearings are held. Section 554 thus does not mandate a hearing on attorney fees. We therefore conclude that the administrative law judge fully complied with the required procedures in awarding the attorney's fee.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

JULIUS MILLER
Administrative Appeals Judge

ISMENE M. KALARIS
Administrative Appeals Judge

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 20th day
of May 1980

SERVICE SHEET

BRB No. 79-558: DAVID E. CARROLL v. HULLINGHORST INDUSTRIES, INC. and/or BASF WYANDOTTE CORPORATION (Case No. 76-LHCA-652) (OWCP No. 7-34955)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981-1982

NO. 81-693

HULLINGHORST INDUSTRIES, INC.

Petitioner,

VERSUS

DAVID E. CARROLL

AND

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR

Respondents.

MOTION TO PROCEED IN OPPOSITION
TO WRIT OF CERTIORARI IN FORMA PAUPERIS

NOW INTO COURT, through undersigned counsel, comes Respondent, David E. Carroll, and moves this Honorable Court for leave to file the attached Opposition to Writ of Certiorari in Forma Pauperis pursuant to 28 U.S.C. §1915, for the reasons more fully set forth in the attached Affidavit in Support of Motion to Proceed in Forma Pauperis. No leave to proceed in forma pauperis has been sought in any Court below.

O R D E R

Considering the foregoing,

IT IS ORDERED that Respondent, David E. Carroll, be allowed to oppose the above captioned Writ of Certiorari in forma pauperis.

JUSTICE OF THE
UNITED STATES SUPREME COURT

Respectfully submitted,

MARTZELL, MONTERO & LAMOTHE

BY: Charles F. Gay Jr.

CHARLES F. GAY, JR.
338 Lafayette Street
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10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981-1982

NO. 81-693

HULLINGHORST INDUSTRIES, INC.,

PETITIONER,

VERSUS

DAVID E. CARROLL

AND

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

RESPONDENTS.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED ON OPPOSITION
TO WRIT OF CERTIORARI IN FORMA PAUPERIS

I, David E. Carroll, being first duly sworn, depose and say that I am the Respondent in the above entitled case; that in support of my Motion to Proceed on Appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entititled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of opposing the Writ of Certiorari filed by Petitioner herein are true.

1. Are you presently employed?

   a. No.

   b. Date of last employment: December 12, 1972; Wages at that time: Approximately $731.24/month

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. No.

3. Do you own any cash or checking or savings account?

   a. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. Real estate: Yes, my home;

   Stocks: No;

   Bonds: No;

   Notes: No;

   Automobiles: Yes, one 1974 Oldsmobile and one 1978 GMC pick-up truck;

   Other valuable property: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   a. Delphia Carroll - husband

   David E. Carroll, Jr., - father

   Henry O. Carroll - father

   Kathryn R. Carroll - father

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

David E. Carroll

DAVID E. CARROLL

Sworn to and subscribed
before me, Notary, this
29 day of October, 1981.

NOTARY PUBLIC

O R D E R

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE OF THE
UNITED STATES SUPREME COURT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981-1982

NO. 81-693

HULLINGHORST INDUSTRIES, INC.,

Petitioner,

versus

DAVID E. CARROLL
AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

Respondents.

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for David E. Carroll

OPPOSITION TO HULLINGHORST INDUSTRIES' WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, David Carroll, opposes Hullinghorst Industries' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reported at 650 F. 2d 750. In support of this opposition, respondent would show that this case does not warrant invocation of this Court's discretionary jurisdiction.

ISSUE

Are there "special and important reasons" warranting the exercise of this Court's judicial discretion in granting Writs of Certiorari in this case?

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States establishes the standard to be used by this Court in considering an application for Writs of Certiorari. The standard is a demanding one, requiring a showing of both special and important reasons before such a review will be granted. It is respectfully suggested that this case satisfies neither of these criteria and the instant Petition for Writs of Certiorari should, accordingly, be denied.

What constitutes special and important reasons which would allow exercise of the Court's discretion? Rule 17 provides some insight. Although not explicitly limiting the instances in which the Court will grant certiorari, the rule sets out seven examples of the character of reasons that will be considered:

1. When a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;
2. When a federal court of appeals has decided a federal question in a way in conflict with a state court of last resort;

3. When a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of the court's power of supervision;

4. When a federal court of appeals has so far sanctioned such a departure by a lower court as to call for the exercise of the court's power of supervision;

5. When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals;

6. When a state court or federal court of appeals has decided an important question of federal law which has not been but should be settled by this court;

7. When a state court or federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this court.

Additionally, certain cases have suggested two further grounds for invocation of this Court's certiorari jurisdiction:

8. When the case involves significant constitutional questions;

9. When the case involves an issue of substantial public interest.

See: U.S. V. Nobles. 95 S. Ct. 2160, 422 U.S. 225, 45 L. Ed. 2d 141 (1975)

It is suggested that this case satisfies none of the above criteria and that the instant Petition for Writ of Certiorari must therefore be denied.

Petitioner would have this Honorable Court believe that the decision of the Fifth Circuit Court of Appeals is in direct conflict with other circuit courts of appeal in its construction of the coverage provisions of the Longshoremen and Harbor Workers' Compensation Act. However, there is in fact no language in the Fifth Circuit's opinion which conflicts with any of the cited cases. Indeed, the opinion in question specifically adopts the very test for maritime employment affirmed by this Court in Jacksonville Shipyards Inc. v. Perdue, 539 F. 2d 533, 539-40 (5th Cir. 1976) vacated and remanded in part sub nom. P.C. Pfeiffer Company, Inc. v. Ford, 433 U.S. 904, 97 S. Ct. 2966, 53 L. Ed. 2d 1088 (1977), reaff'd on remand, 575 F. 2d 79 (5th Cir. 1978) (per curiam), aff'd sub nom P.C. Pfeiffer Companpy, Inc. v. Ford, 444 U.S. 69, 100 S. Ct. 328, 62 L.Ed. 2 225 (1979):

> [A]n injured worker is a covered "employee" if...(a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.

In affirming the decision on remand of the Administrative Law Judge and Benefits Review Board, the Fifth Circuit Court of Appeals specifically accepted the finding that respondent, David Carroll, was directly involved in the work of loading and unloading vessels at the time of his injury. At page 10 of its Petition for Writ of Certiorari, petitioner suggests that the Fifth Circuit "concluded that because Carroll's work involved his presence in the 'situs' area and because it tangentially involved a pier, he was therefore engaged in maritime employment". However, a careful reading of the opinion provides no support for such a statement and actually proves it to be a serious mischaracterization of the court's holding. Indeed, a thorough review of the opinion of the court of appeals demonstrates that the Fifth Circuit panel correctly concluded, from the record before it, that the work which David Carroll was engaged in at the time of his injury (erection of a scaffold for the sole purpose of repairing a piece of longshoring equipment) was an integral part of the repair of that equipment and hence that David Carroll was "directly involved" in maritime employment.

Construction of statutory language is seldom an easy task. Nor is the Longshoremen and Harbor Workers' Compensation Act any exception. However there is no support

for petitioner's assertion that the appellate court's holding ignores and abrogates the language of the Longshoremen and Harbor Workers' Compensation Act by extending coverage "to employees who are beyond the scope of both the express language of the statute and congressional intent." Such a conclusion fails altogether to consider the "direct involvement with maritime employment" tests approved by this Court. Petitioner refuses to recognize that the scaffold in question didn't just "happen" to be located on a pier. It was being constructed for the specific and sole purpose of repairing a turntable used to load and unload ships. Under numerous cases interpreting the 1972 Amendments to the Longshoremen & Harbor Workers' Compensation Act, coverage has been provided to persons repairing, sandblasting, even painting longshoring equipment. Why should respondent David Carroll be treated any differently?

As a final "ground" for granting certiorari in this case, petitioner suggests that the appellate court's opinion in this case totally ignores the "employer" test under the Act. Of course, there are no reported appellate cases recognizing such a separate independent test. The reason for this phenomenon is rather obvious. In most instances, an employer has more than one employee performing a particular type of work. It would be a rare case in

which only one employee of a given employer was engaged in work qualifying as "maritime employment". Certainly, in the instant case, if this Court accepts the Fifth Circuit's holding that David Carroll was engaged in "maritime employment" at the time of his injury, then every other Hullinghorst employee involved in the erection of that scaffold was likewise engaged in maritime employment. Thus, in the instant case, Hullinghorst Industries met the "employer" test - if indeed there is such a separate requirement.

CONCLUSION

This case presents neither a conflict with an opinion of the United States Supreme Court, a conflict between the circuits, a constitutional issue or a matter of public interest. It presents an opinion of the Fifth Circuit Court of Appeals which correctly interpreted and applied the jurisdictional provisions of the Longshoremen & Harbor Workers' Compensation Act. It presents no issue justifying invocation of the discretionary certiorari jurisdiction of this the highest Court of our land.

Respectfully submitted,

MARTZELL, MONTERO & LAMOTHE

BY: Charles F. Gay Jr.

CHARLES F. GAY, JR.
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CERTIFICATE

PARISH OF ORLEANS

STATE OF LOUISIANA

BEFORE ME, the undersigned Notary Public, personally came and appeared Charles F. Gay, Jr., who, after being duly sworn, did state:

I am a member of the Bar of the Supreme Court of the United States. I certify that on this day I have personally supervised the mailing of the original and one copy of this Opposition to Petition for Certiorari, which was deposited in a United States Post Office mail box, with first class postage prepaid and properly addressed to the Clerk of this Court. I further state that this mailing took place within the time extension granted by the Clerk to all respondents.

I further certify that a copy of this Opposition to Petition for Certiorari has been sent to each of the following individuals and/or entities by depositing said copies in a United States Post Office mail box, with first class postage prepaid and properly addressed to the following individuals and/or entities:

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Charles F. Gay Jr.
CHARLES F. GAY, JR.

SWORN TO AND SUBSCRIBED BEFORE ME, Notary Public, this 8th day of December, 1981 at New Orleans, Louisiana, before the undersigned competent witnesses.

WITNESSES:

Linnea Ludeco

Janine Syll Simerly
NOTARY PUBLIC

Office - Supreme Court, U.S.
FILED
DEC 11 1981
ALEXANDER L. STEVAS
CLERK

No. 81-693

In the Supreme Court of the United States

OCTOBER TERM, 1981

HULLINGHORST INDUSTRIES, INC., PETITIONER

v.

DAVID E. CARROLL AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a worker injured while erecting a scaffold to be used in repairing a turntable utilized in the loading and unloading of vessels was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act at the time of injury.

2. Whether the status of an injured claimant's employer as an "employer" within the meaning of Section 2(4) of the Act may be based on the fact that the claimant himself meets the coverage requirements of Sections 2(3) and 3(a) of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-693

HULLINGHORST INDUSTRIES, INC., PETITIONER

v.

DAVID E. CARROLL AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 650 F. 2d 750. The opinions of the Benefits Review Board (Pet. App. 29-36, 69-75) are reported at 7 B.R.B.S. 538 and 12 B.R.B.S. 401. The opinion of the administrative law judge (Pet. App. 19-28) and his opinion on remand from the Benefits Review Board (Pet. App. 39-53) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1981. The petition for a writ of certiorari was filed on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. BASF Wyandotte Corporation owns and operates a port facility along the Mississippi River in Geismar, Louisiana (Pet. App. 2). Respondent David E. Carroll was employed by petitioner Hullinghorst Industries, Inc., the scaffolding contractor at the Wyandotte port facility. The sole function of petitioner and its employees was to erect scaffolding for whatever purpose needed at the port facility (*ibid.*). Carroll was injured in the course of his employment on December 12, 1972, while erecting a scaffold beneath a pier extending over the Mississippi River (*id.* at 2, 48). The purpose of the scaffold was to provide a place for Wyandotte employees to stand while repairing a turntable used in the loading and unloading of vessels that had been damaged by a ship. Carroll was not to be involved in the actual repair of the turntable.

2. Respondent Carroll filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* The administrative law judge found that Carroll was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. 27-28). The administrative law judge also found that petitioner was not an "employer" within the meaning of Section 2(4) of the Act, 33 U.S.C. 902(4) (Pet. App. 27 n.3).

The Benefits Review Board reversed the administrative law judge's decision and remanded the case for determination of the amount of compensation due (Pet. App. 29-36). The Board noted that Carroll's job was "building a scaffold to facilitate repair of cargo handling equipment" and stated that "the scaffold was an 'essential aspect' of the business of loading and unloading ships at Wyandotte's pier. Accordingly, [Carroll] is an employee under Section 2(3) of the Act" (*id.* at 35).

On remand, the administrative law judge found that Carroll was injured in the course of his employment with petitioner and was permanently and totally disabled (Pet. App. 39-54). The Board sustained the administrative law judge's decision and award of compensation (*id.* at 69-77).

3. Petitioner sought judicial review, and the court of appeals affirmed the Board's decision (Pet. App. 1-17). The court stated that the Fifth Circuit "has made it clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' as that term is used in the Act" (Pet. App. 8). The scaffolding project on which respondent Carroll was working when he was injured was "indisputably maritime in nature," the court held, because the project "was part of the ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships" (*ibid.*).

The court of appeals rejected petitioner's contention that, because Carroll was not to play a "direct" role in the actual turntable repair work, this case was distinguishable from previous cases in which employees engaged in maintenance and repair work were held to be engaged in maritime employment. The court stated (Pet. App. 8-9):

> Carroll's work in erecting the scaffolding was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. It was not merely "incidental" to that project, see *Dravo Corp.* v. *Banks*, 567 F. 2d 593, 595-96 (3d Cir. 1977) unskilled laborer spreading salt on ice at shipyard not engaged in maritime employment), nor was it the type of job "peripherally related to maritime matters that Congress said was not to be covered by the LHWCA, such as tran-shipment of stored cargo or clerical work," see *Odom Construction Co.* v. *United States Dep't of Labor*, [622 F. 2d 110,

113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981)]. It was an integral step in a maritime project of the type that could be performed by a typical harborworker. See *id.* at 112. It directly furthered the maritime goals of the Wyandotte port facility—the loading and unloading of ships. See *Trotti & Thompson* v. *Crawford* [631 F. 2d 1214, 1220 (5th Cir. 1980)]. It clearly bore a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters'. . . ." *Odom Construction Co.* v. *United States Dep't of Labor, supra,* 622 F. 2d at 113. That the skills utilized by Carroll were "essentially nonmaritime" in character is immaterial. It is the purpose of the work that is the key; "nonmaritime" skills applied to a maritime project *are* maritime for purposes of the "maritime employment" test of the Act. *Mississippi Coast Marine* v. *Bosarge,* 637 F. 2d 994, 997-98 & n.7 (5th Cir. 1981); *Trotti & Thompson* v. *Crawford, supra,* 631 F. 2d at 121 nn.15, 16. *See Odom Construction Co.* v. *United States Dep't of Labor, supra,* 622 F. 2d at 112-13.

The court of appeals also rejected petitioner's contention that maintenance and repair of maritime facilities comes within the "maritime employment" status requirement of the Act only when an injured worker's own employer uses the facilities for maritime purposes. Noting that it had rejected a similar argument with respect to the situs requirement of Section 3(a) of the Act, 33 U.S.C. 903(a), in *Odom Construction Co.* v. *United States Department of Labor, supra,* the court stated: "Nothing in the language of the Act * * * would suggest a requirement that an employee injured in what would otherwise be considered maritime employment would nevertheless be barred from recovery because his employer was performing functions that were an integral part of indisputably maritime activity that was

conducted by *another*, and not by the employer itself" (Pet. App. 11-12; emphasis in original).

Finally, the court of appeals rejected the contention that petitioner is not a statutory employer within the meaning of Section 2(4) of the Act, 33 U.S.C. 902(4). Section 2(4) defines an "employer" as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States * * *." The court noted that the "employer" status requirement for coverage had more significance before the LHWCA was amended in 1972 (Pet. App. 13). Prior to 1972, the court explained, the Act had no "employee" status requirement; a claimant was eligible for compensation even if he was not engaged in maritime employment, so long as he was injured upon the navigable waters of the United States and his employer had at least one worker engaged in maritime employment (*ibid.*). However, with the enactment of the 1972 amendments, the claimant himself must be engaged in maritime employment in order to meet the coverage requirement of Section 2(3). Thus, the court noted, if a claimant meets the status requirement of Section 2(3) and the situs requirement of Section 3(a), the claimant's employer automatically qualifies as an "employer" within the meaning of Section 2(4) (*ibid.*).

ARGUMENT

1. The decision of the court of appeals that respondent Carroll was "engaged in maritime employment" within the meaning of Section 2(3) of the LHWCA is correct and does not conflict with the ruling of any other circuit. Even if a "significant relationship to navigation and commerce" were an indispensable component of "maritime employment" under Section 2(3)—and we do not believe it is—Carroll's work would satisfy the statutory requirement.

The court of appeals decided that Carroll was "engaged in maritime employment" because the work he was performing when he was injured "was part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and unloading of ships," and "was indisputably maritime in nature" (Pet. App. 8). This decision is unassailable, for as the court noted, the cases interpreting Section 2(3) have established that maintenance and repair of maritime equipment and facilities are covered by the LHWCA.[1]

Petitioner concedes (Pet. 11) that the courts have held that workers engaged in maintenance and repair of maritime facilities are covered by the Act, but it contends (Pet. 10-13) that Carroll is not covered because he was simply performing carpentry work and was not engaged in repairing longshoring equipment. However, as the court of appeals noted, petitioner's distinction is one of no consequence: "Carroll's work in erecting the scaffolding was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. * * * It directly furthered the maritime goals of the

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[1]See, *e.g.*, *Odom Construction Co.* v. *United States Department of Labor*, 622 F. 2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Texports Stevedore Co.* v. *Winchester*, 554 F. 2d 245, 247 (5th Cir.), modified in part on rehearing on other grounds, 561 F. 2d 1213 (5th Cir. 1977), aff'd on rehearing en banc on other grounds, 632 F. 2d 504 (5th Cir. 1980), cert. denied, No. 80-1549 (June 1, 1981); *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess*, 554 F. 2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977); *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F. 2d 30, 37-38 (1st Cir. 1980), cert. denied, 80-1609 (June 15, 1981); *Price* v. *Norfolk & Western Ry.*, 618 F. 2d 1059, 1061, 1062 (4th Cir. 1980); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 140-141 (9th Cir. 1978).

Wyandotte port facility—the loading and unloading of ships" (Pet. App. 8-9). This decision is plainly correct.[2]

2. Petitioner erroneously contends (Pet. 12-15) that the "employer" requirement of Section 2(4) of the Act is a separate test of coverage and that it is not an "employer" within the meaning of Section 2(4) because Carroll is its only nexus with maritime activity. As the court of appeals noted (Pet. App. 13), the "employer" requirement had more significance under the original LHWCA, because an employee injured on navigable waters was covered by the original Act even if he was not engaged in maritime employment, so long as his employer had at least one worker engaged in maritime employment. However, the addition of the "maritime employment" status requirement for employees in the 1972 amendments to the Act has

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[2]Petitioner's reliance (Pet. 12), on *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981), is misplaced. The Second Circuit in *Fusco* denied coverage to marine construction workers because the ultimate purpose of the construction project—a sewage treatment plant—did not have a "significant relationship to navigation or to commerce on navigable waters" (622 F. 2d at 1113). See also *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (2d Cir. 1981). We do not agree with the Second Circuit's decision (see Petition for a Writ of Certiorari, *Director, Office of Worker' Compensation Programs* v. *Perini North River Associates*, No. 81-897 (filed Nov. 12, 1981)); however, it is obvious that even the Second Circuit would conclude that respondent Carroll was "engaged in maritime employment," for the ultimate purpose of his work—repair of longshoring equipment—is indisputably maritime. Cf. *Arbeeny* v. *McRoberts Protective Agency*, 642 F. 2d 672, 675 (2d Cir. 1981), cert. denied, No. 80-2180 (Oct. 5, 1981). Likewise, the Fourth Circuit's decision in *Conti* v. *Norfolk & Western Ry.*, 566 F. 2d 890 (1977), provides no support for petitioner's position. The brakemen held not to be covered in *Conti* were involved in unloading coal from railroad cars into receiving bins where the coal awaited transfer into vessels at an inland terminal. This activity was only peripherally related to maritime work, whereas Carroll's work at the time he was injured was an integral part of a maritime equipment repair project.

rendered the "employer" requirement "largely tautological" (*id.* at 13). In order to be covered by the amended LHWCA, a claimant must himself be "engaged in maritime employment" within the meaning of Section 2(3). Thus, an employer with an employee who meets the status requirement of Section 2(3) and who was injured on a maritime situs as defined in Section 3(a) is automatically an "employer" within the meaning of Section 2(4). See *Walter Tantzen, Inc.* v. *Shaughnessy*, 624 F. 2d 5 (2d Cir. 1980).

The legislative history of the 1972 amendments does not, as petitioner suggests (Pet. 14), support its contention. While the legislative history indicates that "an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered" (S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972)), nothing in the legislative history or in case authority indicates that the "employer" requirement may not be satisfied by the maritime "employee" status of the injured claimant. As this Court stated in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 74 (1979), "[t]o be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains injury on the situs defined by § 3(a)." There is no additional requirement under Section 2(4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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